No. 2975

In The

United States Circuit Court of Appeals

For the Ninth Circuit

COGGESHALL LAUNCH COMPANY
(a corporation)
Appellant,

vs.

ELIZA A. EARLY, claimant,
Appellee.

REPLY BRIEF FOR APPELLEE.

W. ERNEST DICKSON,
Proctor for Appellee.

Filled this ..... day of October, 1917.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

Olcott Cummins, Printer, Eureka, Cal.

No. 2975

In The

United States Circuit Court of Appeals

For the Ninth Circuit

COGGESHALL LAUNCH COMPANY
(a corporation)
Appellant,

vs.

ELIZA A. EARLY, claimant,
Appellee.

CLAIMANT'S AND APPELLEE'S REPLY BRIEF.

THE RECORD.

The apostles on appeal show the following matters of record. On March 19th, 1915, the petitioner and appellant filed its petition for limitation of liability. (Trans. pages 6 to -6). That after due proceedings had been taken the Hon. District Court issued its orders for a monition. (Trans. pages 30 to 32). And on June 28th, 1915, such monition was issued (Trans. pages 37 to 40), and on the same day on application therefor the court issued its restraining order, restraining the claimant, ELIZA A. EARLY, and her attorney from prosecuting her claim in the

Superior Court of Humboldt County, California. (Trans. pages 43 to 46). That thereafter, and within the time allowed by law and the court, the claimant, Eliza A. Early, to wit, July 19th, 1915, filed her answer in due form of law to the said Petition for Limitation of Liability (Trans. pages 47 to 53); and the day before filing her answer, to wit, July 18th, 1915, she had filed her claim which appears on pages 328 to 335 of the Transcript.

It will readily be observed that the answer and claim are in due form.

> "In admiralty the parties are not held "to great nicety in pleadings, and where the "libel states facts which warrant a recov- "ery, and the real issues are tried, a recov- "ery will not be denied because the libel "counts on the breach of a charter which was not binding on respondent."
>
> W. S. Keyser & Co. vs. Jurvelius, 122 Fed. 218, 58 C. C. A. 664.

The form of the answer and claim in the case at bar is found approved in a like cause in this Honorable Court. We cite the Court to the cause of Humboldt etc. vs. Christopherson, 73 Fed. Rep. 339, where the cause of action arose almost in the same waters.

In case at bar no exceptions were made to either the answer or claim, nor was there any demurrer interposed. The cause came on regularly for trial, and was heard in open court. The testimony of the wit-

nesses and evidence taken is found in the Transcript on pages 56 to 275. The minute order awarding damages on page 276, the opinion of the Court on pages 277 to 286, the minute order for decree on pages 286 to 287, the order for decree on page 287, the final decree on pages 288 to 299, and the Assignment of Errors on pages 302 to 306 of the Transcript.

ARGUMENT.

WE WILL PRESENT OUR ARGUMENT IN THE FOLLOWING ORDER.

1st. THE DISCUSSION OF THE SUFFICIENCY OF APPELLANT'S ASSIGNMENTS OF ERRORS.

2nd. THE JURISDICTION OF THE COURT.

3rd. WAS APPELLANT A COMMON CARRIER.

4th. THE LIABILITY OF APPELLANT AS A COMMON CARRIER.

5th. THE TENTH ASSIGNMENT OF ERROR.

6th. THE ELEVENTH ASSIGNMENT OF ERROR.

7th. THE TWELFTH ASSIGNMENT OF ERROR.

8th. THE THIRTEENTH ASSIGNMENT OF ERROR.

9th. THE FOURTEENTH ASSIGNMENT OF ERROR.

10th. THE FIFTEENTH ASSIGNMENT OF ERROR.

11th. THE SIXTEENTH ASSIGNMENT OF ERROR.

12th. THE SEVENTEENTH ASSIGNMENT OF ERROR.

13th. THE EIGHTEENTH ASSIGNMENT OF ERROR.

14th. THE REPLY TO APPELLANT'S CONTENTION OF ITS NON-LIABILITY.

1st. SUBDIVISION.

THE DISCUSSION OF THE SUFFICIENCY OF APPELLANT'S ASSIGNMENTS OF ERRORS.

We urge that the 1st, 2nd, 3rd, and 4th assignments of error are too general.

The Natches, 78 Fed. 183, 24 C. C. A. 49.

> "An assignment "that the court erred " "in holding that libellant was entitled to " "any compensation for the injuries re- " "ceived" by him is too general."

Lafourche vs. Henderson, 94 Fed. 871.
36 C. C. A. 519.

2nd. SUBDIVISION.

THE JURISDICTION OF THE COURT.

We deem it incumbent on claimant to state the law applicable to claims like the one at bar.

Section 376 and 377 of the Code of Civil Procedure of the State of California reads as follows:

> "When the death of a person not being "a minor is caused by the wrongful act or "neglect of another, his heirs or personal "representatives may maintain an action "for damages against the person causing "the death, or if such persons be employed "by another person who is responsible for "his conduct, then also against such other "person. In every action under this and "the preceding section, such damages may "be given as under all the circumstances of "the case may be just." (Sec. 376).
>
> "A father, or in case of his death or de- "sertion of his family, the mother, may "maintain an action for the injury or death "of a minor child, and a guardian for the "injury or death of his ward, when such in- "jury or death is caused by the wrongful "act or neglect of another. Such action "may be maintained against the person "who is responsible for his conduct, also "against such other person." (Sec. 377).

George D. Early, the minor son of Claimant, and for whose death damages are claimed, lost his life in Humboldt Bay, within the boundaries of Hum-

boldt County, State of California. (See Trans. pages 112, 113, 114, 127, 128, 149, 159, 160, 161, 162, 166). It is a fact not disputed.

"The laws of a state may create a lia-
"bility in a marine cause arising on the high
"seas within its boundaries."

145 U. S. 335.
36 L. Ed. 727.

"The District Court of the United
"States has jurisdiction in admiralty to give
"damages for loss of life, where the statute
"of a state in which the accident occurred
"gives the right of action for such loss."

The Harrisburg, 119 U. S. 199.
30 L. Ed. 358.
The E. B. Ward, 17 Fed. 456.
The Highland Light, Fed. Cases No. 6,477.
The Sea Gull, Fed. Cases No. 12,578.
The Garland, 5 Fed. Rep. 924.
Holmes vs. Oregon, 5 Fed. Rep. 524.
The Cephalonia, 29 Fed. Rep. 332.
32 Fed. Rep. 112.
The City of Norwalk, 55 Fed. Rep. 99.
The St. Nicholas, 49 Fed. Rep. 671.
The Oregon, 45 Fed. Rep. 62.
The Clatsop Chief, 8 Fed. Rep. 163.
The Columbia, 27 Fed. Rep. 704.
Grimsley vs. Hawkins, 46 Fed. Rep. 400.
Humboldt etc. vs. Christoperson, 73 Fed. Rep. 239.

3rd. SUBDIVISION.

WAS APPELLANT A COMMON CARRIER.

Query. Was the Appellant a Common Carrier? It is admitted that the appellant was a public ferryman, operating a steam ferryboat (The Antelope) on Humboldt Bay in the County of Humboldt, State of California. From an early date it was held by the Courts that ferrymen were common carriers.

Babcock vs. Herbert, 3 Ala. 392.
37 Am. Dec. 695.
Fisher vs. Clisbee, 12 Ill. 344.
Powell vs. Mills, 37 Miss. 691.
Sanders vs. Young, 73 Am. Dec. 175.

In Wilson v. Hamilton, 4 Ohio St. 722, the court, by Ranney, J., said: "We have been wholly unsuccessful, after very careful research, in finding where it was even doubted that a ferryman, occupying a position in a line of public travel, and holding himself out for general employment, was not a common carrier, and, as such, subject to all the liabilities incident to that position. That he is such is unqualifiedly asserted by the best text-writers, and enforced in a large number of decided cases. Angell on Carriers, Sections 82, 130; Story on Bailm., Sec. 496; 2 Kent's Com. 599; Smith v. Seward, 3 Pa. St. 342; Pomeroy v. Donaldson, 5 Mo. 36; Cohen v. Hume, 1 McCord L. (S. Car.)

444; Rutherford v. M'Gowen, 1 Nott & M. (S. Car.) 19; Garner v. Greene, 8 Ala. 96; Trent v. Cartersville Bridge Co., 11 Leigh (Va.) 544; Fisher v. Clisbee, 12 Ill. 344; Walker v. Jackson, 10 M. & W. 161."

"The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities."

May vs. Hanson, 5 Cal 360.

Griffith vs. Cave, 22 Cal. 534.

Slimmer vs. Merry, 23 Iowa, 94.

Chevallier vs. Straham, 47 Am. Dec. 653.

Liverpool S. Co. vs. Phoenix Co., 129 U. S. 439.
32 L. Ed. 791.

The Montana, 22 Fed. 727.

Moses vs. Hamburg American S. Co., 88 Fed. 330.

Delaware Etc. vs. Ashley, 67 Fed. 212.

The City of Panama, 101 U. S. 462.

"A ferryman becomes liable as soon as "he signifies his assent or readiness to re- "ceive the passenger, or has accepted and "received the property for carriage."

May vs. Hanson, 5 Cal. 360.

Griffith vs. Cave, 22 Cal. 535.

4th. SUBDIVISION.

THE LIABILITY OF APPELLANT AS A COMMON CARRIER.

"Public ferrymen are common carriers, and liable not only for gross negligence but for all losses except such as are occasioned by the act of the person employing them, the act of God, and the enemies of the country."

May vs. Hanson, 5 Cal. 360.
Cohen vs. Hume, 1 McCord 444.
Pomeroy vs. Donaldson, 5 Mo. 36.
Babcock vs. Herbert, 3 La. 392.
Fether vs. Clisble, 12 Ill. 344.
Slimmer vs. Merry, 23 Iowa 90.
Wilson vs. Hamilton, 4 Ohio St. 722.
Smith vs. Stewart, 3 Pa. St. 342.
Albright vs. Penn. 14 Tex. 290.

"A common carrier of passengers by water is bound to use the utmost care consistent with the nature and extent of their business to guard against injury to passengers."

Simmons vs. Bedford B. & N. S. Co., 97 Mass. 361.

"Common carriers of passengers by water are bound to use the highest degree of care in reference to each particular with reasonable regard to the nature of the undertaking."

Dodge vs. Boston & B. S. Co., 148 Mass. 207.
12 Am. St. Rep. 541.
2 L. R. A. 833.

"A common carrier of passengers is bound to exercise the highest care, skill and foresight conducive to the passenger's safety and capable of being put into practice."

Illinois C. R. Co., vs. Huhn, 177 Tenn., 106.
64 S. W. 202.

"Passengers carriers bind themselves to carry safely as far as human care can go; and are responsible for the slightest negligence."

Leslie vs. Wabash Etc. R. C., 88 Mo. 50.

"A carrier is bound to exercise the highest degree of care and skill to preserve the safety of passengers and prevent accidents; reasonable or ordinary diligence is not sufficient."

Moore vs. Des Moines & Ft. D. R. Co., 69 Iowa 491.

"Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence."

New York C. T. R. Co. vs. Lockwood, 84 U. S. 357.
21 L. Ed. 627.

"Any negligence in such a case may well deserve the epithet of gross."

Phila. & R. R. Co. vs. Derby, 55 U. S. 46.
14 L. Ed. 502.

Penn. Co. vs. Roy, 102 U. S. 455—26 L. Ed. 144.

The John G. Stearns, 170, U. S. 125—42 L. Ed. 974.

"The law requires the carrier to use the highest care, diligence and skill known to careful, diligent, and skillful carriers."

Montgomery and E. R. Co. vs. Mallette, 92 Ala. 215.
9 So. 363.

C. T. of G. R. Co. vs. Johnston, 106 Ga. 136.
32 S. E. 78.

Alabama G. S. R. Co. vs. Hill, 93 Ala. 521.
30 Am. St. Rep. 65.

"Where a libel was filed, claiming compensation for injuries sustained by a passenger in a steamboat, proceeding from Sacramento to San Francisco, in California, the case is within the admiralty jurisdiction of the Courts of the United States.

"The principal asserted in 14 How, 486, re-affirmed, namely: when carriers undertake to convey persons by the agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence."

The S. New World vs. King, 57 U. S.
469.
14 L. Ed. 1019.

5th. SUBDIVISION.

THE TENTH ASSIGNMENT OF ERROR.

In discussing the tenth assignment of error it will also be necessary at the same time to take up and discuss the nine assignments preceding the tenth, in order to make a logical discussion of the whole case. Therefore we will dispose of the tenth assignment before going into the meat of the case presented by the appeal.

The 10th assignment of error is that

> "The said District Court errer in find-
> "ing that the petitioner Coggeshall Launch
> "Company was negligent in failing to put
> "up a bar across a cargo port door and
> "therefore rendering judgment in favor of
> "said claimant."

In this behalf, claimant urges that it was the duty of appellant to keep the bar in place. It was a duty that could not be delegated to another. It was a requirement of the constituted authorities.

We quote from the testimony of Walter Coggeshall, president of appellant.

Q. "What was the custom and practice of the
"Coggeshall Launch Company in regard to pro-
"tecting the doorway, when open?"

Ans. "Why, this custom was brought about "through an order of the United States Inspec- "tion Sercise. The Inspectors came here some "five years ago and said: 'Now, do you ever "open that door?' I said that I did. They said "'If that is the case'—The instructions laid "down were—the regulation to us—the inspec- "tor said, 'You will have to put a bar across "this door to have in case this cargo-port is "open, and we would advise you to have a bar "made and put across here, and it may be "locked.' I said 'All right, I will do so.'

"I followed the orders of the Steamboat "Inspection Service.

"The orders that I gave to the captain of "the boat and that he should transmit to the "crew were that under no circumstances should "that door ever be open unless at the time it "was open the bar should be safely in its place;"

(See testimony of Walter Coggeshall pages 174 to 175 of the Transcript). The same witness commencing on page 177 of the Transcript.

"But if we did elect to open the cargo port "for ventilation or for other purposes, then they "must have a bar to take its place. Further- "more, from this moment that I got the instruc- "tion from the steamboat inspectors I had that "bar made, and I notified my master, I notified "him personally, and I know he notified the "crew, and I notified them—my instruction was "that a failure to conform with the orders of the "officers of the Steamboat Inspection Service "would result in discharge on my part, as it was "a very important matter and to my knowledge "that order was issued and was never violated

"by one of these men. If they opened the door "they never failed to put that bar in place."

Then again on page 178 of the Transcript the witness testifies:

"The bar is simply fastened with a pin. By "the word 'lock' that does not mean as you "would put a padlock on it; it simply means a "pin right through. There were many accidents "resulting years ago and they were ordered to "put bars on steamers, and later, when a man "went overboard, as the result of that accident "the law requires that all bars must be locked "with a key."

LIABILITY IMPOSED BY FAILURE TO PUT THE BAR IN PLACE.

Under the above heading I shall discuss three questions. Viz.

A. Did the petitioners owe to their passengers the duty of putting the bar in place notwithstanding the fact that the door was closed.

B. Was the failure to put the bar in place the proximate cause of the injury.

C. The known custom of passengers to open the door.

1. How it affects the question of legal liability.
2. What was the legal effect if done contrary to orders.

We call the court's attention to the findings of the Honorable District Court, on this particular

question in controversy appearing on pages 295 and 296 of the Trans., viz;

> "That it was gross negligence on the "part of petitioner, Coggeshall Launch "Company, to leave the dock, on the said "voyage and evening hereinbefore found, "with an opening of six or eight feet wide, "such as was the said cargo-port door lead- "ing directly to the water, and with the said "lower deck of said ferryboat crowded with "passengers, and without the said protect- "ing bar across said cargo-port doorway; "and that it was the duty of the said oper- "ators of the said vessel to have the said bar "in place across the said (243) cargo-port "opening."
>
> "That the said George D. Early, now "deceased, did not open the door at the place "where he fell through, and he did not con- "tribute in any degree to the lack of pro- "tection at said place on said ferry-boat "'Antelope' occasioned by the absence of "the said bar.
>
> "That at the time the said George D. "Early, now deceased, fell into the waters "of Humboldt Bay and was drowned, as "hereinbefore found, it was between five "thirty and six o'clock in the evening of "January 15th, 1015, and while not yet "quite dark, it was not however, wholly "light.
>
> "That in operating the said steam fer- "ry-boat 'Antelope' on the voyage, day and "evening hereinbefore found, one man short "contrary to the requirements of law, re-

"sulting in the fact that the bar across the "said cargo-port door opening was not in "place; leaving the dock at Samoa without "having the said bar in place across the "said cargo-port opening some six or eight "feet wide, leading directly to the water, "on said lower deck of said ferry-boat then "filled with passengers, under the then ex- "isting and prevailing conditions, the said "petitioner, Coggeshall Launch Company, "and its said steam ferry-boat 'Antelope' "was guilty of gross and inexcusable care- "lessness and negligence, and her said pas- "senger George D. Early was drowned by "reason of said carelessness and negli- "gence."

The question presented to this Honorable Circuit Court of Appeals is, whether or not this finding of the District Court is supported by the evidence.

"A finding of fact by the District Judge "in an admiralty suit, based upon testimony "taken in open court, should be accepted by "the appellate court, unless the evidence "clearly preponderates against it."

Erie etc. vs. Dunseith, 239 Fed. 814.

"This conclusion of the District Judge "that the steamer was so in fault, reached "after the hearing of the character stated, "should be accepted by us, unless the evi- "dence clearly preponderates against it."

City of Cleveland vs. Chrisholm, 90 Fed. 157.
33 C. C. A. 157.

Monongohela etc. vs. Hurst, 200 Fed. 711.
119 C. C. A. 127.

Pugh vs. Snodgrass, 209 Fed. 325.
126 C. C. A. 251.

"The well settled rule, which has been "followed by this and other courts, that in "case on appeal in admiralty, when ques- "tions of fact are dependent upon conflict- "ing testimony, the decision of the District "Judge, who had the opportunity to see the "witnesses and judge of their appearance, "manner, and credibility, will not be re- "versed, unless it clearly appears to be "against the weight of the evidence."

The Hardy, 229 Fed. 985.

The Alijandro, 56 Fed. 621.
6 C. C. A. 54.

Perriam vs. Pac. C. Co., 133 Fed. 140.
66 C. C. A. 206.

Peterson vs. Larsen, 177 Fed. 617.
101 C. C. A. 243.

Before further discussion, we wish to call the attention of this Honorable Court to the findings of fact the Hon. District Court immediately preceding the aforesaid quoted portion of the findings, found on pages 290, 291, 292, and 293 of the Transcript, viz:

"That at all times mentioned in said "petition, and the claim and answer thereto "and herein, the said ferry-boat 'Antelope' "was run and operated by the petitioner, "Coggeshall Launch Company, who had "possession of said ferry-boat 'Antelope'

"under a contract of purchase from the pe-
"titioner, Hammond Lumber Company;
"that the passengers of said ferry-boat
"'Antelope' consisted for the most part of
"workmen going back and forth from their
"homes in Eureka to their work across
"Humboldt Bay at the Samoa mill, and for
"that reason the passenger list on said fer-
"ry-boat 'Antelope' remained practically
"the same. That a large number of these
"men were regularly carried on the freight
"deck, that is to say, the lower of the two
"decks of said ferry-boat. That this said
"lower deck was almost on a level with the
"surface of the water, and wholly enclosed;
"that on the starboard side, through this
"enclosure, there is a doorway six or eight
"feet wide, known as the cargo port,
"through which it was the custom of peti-
"tioners on the Samoa side of Humboldt
"Bay to take on both passengers and
"freight. That this doorway was closed by
"a sliding door, which was opened by slid-
"ing it aft. That when this door was open
"and the vessel away from the dock, the
"open doorway led right out to the water,
"and there was nothing to prevent a pas-
"senger from falling or walking directly
"through it into the water. That as a pro-
"tection to the passengers on the said lower
"deck, the United States Inspector or-
"dered that a bar about six inches in width,
"when in place, extend across the said port
"opening at a height of between three and
"four feet. That it was the invariable prac-
"tice of the vessel to have the said bar in
"place during the trips of said vessel across
"the said Humboldt Bay whether the said
"door was opened or closed at the time of
"leaving the dock. (240).

"That at the time mentioned in the said

"petition, claim and answer, the said ferry-
"boat 'Antelope' was required by law, as
"appearel from her Certificate of Inspec-
"tion, to carry as her complement of offi-
"cers and crew, one licensed master and pi-
"lot, two deck-hands, one licensed chief en-
"gineer and one fireman.

"That on the evening of January 15th,
"1915, and for nine days prior thereto, the
"said ferry-boat 'Antelope' had been run-
"ning and operated short-handed by reason
"of one of her deck-hands, named Nick, be-
"ing sick in the hospital.

"That on the evening of January 15th,
"1015, at about 5:30 P. M. the said ferry-
"boat 'Antelope' started on her regular
"voyage from Samoa to Eureka without
"having in place the aforesaid mentioned
"bar, which was usually placed across the
"cargo-port doorway to protect passengers
"from the danger of falling through said
"opening into the water. That on this par-
"ticular evening and voyage, to wit, on Jan-
"uary 15th, 1915, the said deck-hand Nick
"was absent as hereinbefore found, and the
"deck-hand Andrew was engaged in taking
"tickets, and that the said deck-hand An-
"drew neither closed the said cargo-port door
"nor put the said bar across the doorway,
"and that the said bar was not in place; and
"in fact the said bar was not put up at all
"on this particular voyage and evening.

"That at the time of the sailing of said
"steam ferry-boat 'Antelope' as hereinbe-
"fore found, before leaving the dock at Sa-
"moa, the said cargo-port door on the said
"lower deck was not closed by the officers
"or crew of said vessel, and although the
"said bar was not put up at all during that
"voyage and evening, but the said door was
"closed before said vessel left Samoa by

"one of the passengers on the said lower "deck.

"That the said cargo-port door was in- "variably opened by some one of the pas- "sengers before reaching the Eureka Dock, "usually being opened when the landing "whistle was blown. That immediately "(241) upon the blowing of the whistle, on "said steam ferry-boat 'Antelope,' for land- "ing and while still in the open waters of "the bay at some distance from the dock, "some passenger or other would open the "said cargo-port sliding door. That the "said opening of the said cargo-port door "was not a casual occurrence, nor even "merely a frequent occurrence, but was an "invariable custom that had been in vogue "for a number of years. This custom of so "opening the said cargo-port door was well "known to all the officers and employees of "said steam ferry-boat 'Antelope,' and was "also known to Captain Walter Coggeshall, "the president of petitioner, Coggeshall "Launch Company."

The evidence fully supports the foregoing findings of the Hon. District Court. The more material findings as aforesaid are not disputed, and the remainder are fully supported by a preponderence of the evidence. The most that can be said in behalf of the Appellant is, that in some instances the evidence is conflicting. The great weight of the evidence sustains the findings appealed from. See the testimony of WILLIAM EARLY, on pages 80 to 87, 169 to 171, and 271 to 272; JOSEPH WHELIHAN on pages 118 to 137 171 to 172; ALVA MOSS on pages 92 to 118, and 172 to 173; OTTO JOHN-

SO Non pages 138 to 145; and EMMETT WHELIHAN on pages 145 to 157.

This Honorable Court has laid down the hard and fast rule, that is

> "The well settled rule is applicable "that the findings of fact of the trial court "will not be disturbed in this court unless it "clearly appears that there was error."
>
> Whitney vs. Olsen, 108 Fed. Rep. 292.
> 47 C. C. A. 331.
> Perriam vs. Pac. Coast Co., 133 Fed. Rep. 140.
> 66 C. C. A.20c.
> The Bailey Gatzert, 179 Fed. Rep. 44.
> 102 C. C. A. 612.

The Transcript presents a clean record devoid of error. At least diligent perusal of the same by counsel for appellee has failed to unearth a single material error. The most that can be said in behalf of the Appellant is, that in some instances there is a conflict of evidence; but there is no instance but in which the preponderance of the evidence supports the findings of the Hon. District Court. On conflicting evidence this Hon. Court has laid down the rule that

> "A finding of fact made by a court of "admiralty on conflicting evidence is pre- "sumptively correct, and will not be re- "versed by the appellate court, unless the "record clearly shows by the weight of the "evidence that it is erroneous."
>
> Louisiana etc. vs. Gidionsen, 217 Fed. Rep. 75.
> 133 C. C. A. 445.

The Elenore, 217 Fed. Rep. 753.
133 C. C. A. 447.

In the Samson, 217 Fed. Rep. at page 347—The court says:

> "Out of the great mass of conflicting "testimony with respect to the maneuvers "of the respective vessels prior to the col- "lision, and the positions of the various "tows thereafter, the learned judge of the "court below found that the point of col- "lision was well to the Oregon side of the "channel, and concluded that the fault was "with the Samson. This finding under well "settled rules of appellate procedure, "should not be disturbed."

Spencer vs. Dalles etc., 188.
Fed. Rep. 865, 868, 100 C. C. A. 499.

It was the legal duty of petitioner to place a barrier across the opening of the cargo port.

Hanley vs. Eastern S. S. Co., 109 N. E. 167.
Peverly vs. Boston, 136 Mass. 336.
Sturgis vs. Kountz, 165 Pa. St. 358.
Clark vs. Union Ferry Co., 35 N. Y. 485.
Wycoff vs. Queens etc., 52 N. Y., 32.
Lewis vs. Smith, 107 Mass. 334.
Ferris vs. Union Ferry Co., 36 N. Y. 312.

It does not require any wonderful reasoning power to perceive that if the door were closed and *remained closed* the bar would be unnecessary; neither does it require any wonderful reasoning power to perceive that if the door were open *or apt to*

be opened, the bar would be very essential to the safety of the passengers.

Counsel may argue that because the door was closed the bar was unnecessary, and if the passengers saw fit to open the door they either assumed the risk or they were guilty of contributory negligence. The argument is fallacious.

Negligence is never absolute. It is always relative and must always be considered in the light of surrounding conditions and circumstances. It is not a question of whether or not the passengers were safe before leaving the Samoa side. It is a question of whether or not they were safe all the way across. The carrier owes to its passengers a very high degree care, and it is the duty of the carrier to see that its passengers are carried in safety, and landed in safety at the termination of the voyage.

The question presented here is; not what were conditions when they left Samoa, but what ought reasonably to have been foreseen.

We may at the outset ask: "If the door is suffi-"cient protection to the passengers why did the company have a bar"? The answer is, that the bar is there or ought to be there for protection, when the door is open. The fact that there is a bar, shows that the company, and the legal constituted authority, recognizes the fact that the door was apt to be opened. The fact that they *frequently* (according to our witnesses *always*) had the bar up even when the door was closed, shows that they recognize and frequently guarded against the door being opened. The

fact that it was the invariable rule for the passengers to open the door and that the company knew it, shows that the company could not have depended upon the door alone as a protection, or if they did that in itself would constitute negligence. If then, they knew and recognized the fact that the door would in all human probabilities be opened, how can it be argued that it would be anything short of gross negligence to leave the bar down even though the door were closed. It certainly falls far short of that high degree of care which the law demands of a carrier for the safety of its passengers.

We can here invoke the doctrine of RES IPSA LOQUITUR which is well stated in RULING CASE LAW VOL. 5 Par. 713 in the following language:

> "In accordance with doctrine of Res Ipsa Loquitur it is usually held that where an accident to a passenger, who is himself without fault, is caused by a defect in any of those things which the carrier is bound to supply, or is the result of a failure in respect of the carriers means of transportation or the conduct of its servants therewith, a presumption of negligence arises as against the carrier, and where one sueing a carrier for injury shows that his injury was thus caused, he makes out a prima facie case for the recovery of damages (Longline of cases here cited). In other words, where a person sueing a carrier of passengers for injury, shows that his injury happened to him without fault or negligence on his part, he makes out a prima facie case for the recovery of damages. It then devolves upon defendant carrier to show the absence of any negligence on the part of itself or its

> agents whereby the accident happened. (Citing a long line of cases among them Treadwell vs. Whittier 80 Cal. 574; Bonneau vs. The North Shore Railroad Co. 152 Cay. 456, same case 125 A. S. R. 68 and note: LeBarron vs. East Boston Ferry Co. 87 Am. Dec. 717 also note 62 Am. Dec. 679."

The reasons assigned for the doctrine of Res Ipsa Loquitur (1) the contractural relation between the passenger and the carrier by which it is incumbent on the carrier to transport with safety; hence the burden; (2) The cause of the accident, if not exclusively in the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting. (Line of cases cited 5 Ruling Case Law, Page 77).

A case in point is Hooper vs. Denver & R. G. R. Co. 155 Fed. 273.

This was a case for death caused by the alleged negligence of defendant Ry. Co. The action was brought under a Colorado Statute which declares that in an action for death caused by a public carrier it shall forfeit for every person and passenger so injured or killed not more than $5,000.00 nor less than $3,000.00. In the case some question was raised as to the sufficiency to the evidence of negligence on defendant's part. The court held that the case was brought within the rule laid down by the Supreme

Court in Gleeson vs. Virginia Milan Co. Ry. Co. (140 U. S. 425) as follows:

> "That the happening of an injurious "accident is in passenger cases prima facie "evidence of negligence on the part of the "carrier, and that (the passenger being "himself in the exercise of due care) the "burden then rests upon the carrier to "show that its whole duty was performed "and that the injury was unavoidable by "human foresight.—The law is that the "plaintiff must show negligence in the de-"fendant. This is done prima facie by "showing, if the plaintiff be a passenger, "that the accident occurred."

See also North Jersey St. Ry. Co. vs. Purdy 143 Fed. 955; Island & Seaboard Coasting Co. vs. Tolson 139 U. S. 551, 35 L. Ed. 270, cases there cited. Southern Pacific Ry. Co. vs. Garvin 144 Fed. 348.

The District Court has found, and the Appellate Court will undoubtedly hold, that the failure to put the bar in place was an act of negligence on the carrier's part, in view of all the circumstances, and that a duty devolved upon them to protect the doorway with the bar, even though the door was closed when the "Antelope" left Samoa.

B. WAS THE NEGLIGENT ACT IN FAILING TO PLACE THE BAR, THE PROXIMATE CAUSE OF THE INJURY.

We wish to call the Court's attention to the findings of the lower court on this question and refer the Court to page 291 of the transcript where this language is used:

"That the doorway was closed by a "sliding door, which was opened by sliding "it aft. That when this door was open and "the vessel away from the dock, the open "doorway led right out to the water, and "there was nothing to prevent a passenger "from falling or walking directly through "it into the water. That as a protection to "the passengers on the said lower deck the "United States Inspector ordered that a "bar about six inches in width, when in "place, extend across said port opening at "a height of between three and four feet."

And again at page 296: "And leaving "the dock at Samoa without *having the bar "in place* across said cargo port opening "some six or eight feet wide leading direct- "ly to the water, on said lower deck of said "ferry boat then filled with passengers, un- "der the then existing and prevailing con- "ditions, the said Petitioner Coggeshall "Launch Co. and its said steam ferry boat "Antelope ,was guilty of gross and inexcus- "able negligence, *and her said passenger,* "George D. Early, *was drowned by reason "of said carelessness and negligence."*

(The italics are ours). The foregoing is amply sustained by the evidence, and the conclusions are drawn from the indisputable facts sustaining the findings.

It is easy to find definitions of Proximate Cause and rules relating thereto, but the application is more difficult. We must therefore turn to decisions of similar causes and find how the courts have applied the rules relating to Proximate Cause.

In 29 Cyc. P. 493 we find a fair statement in the text as follows:

> In addition to the requirement that the result should be the natural and probable consequence of the negligence, it is continuously stated that the consequence should be one which in the light of attending circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence.

We cannot in this case intelligently discuss the question of the closed door and its relation to proximate cause without at the same time, and in connection with it, discuss the attending circumstances viz:—That the door would surely be opened.

In the case at bar the opening of the door cannot be considered as a new and independent cause, which could have produced the injury, without the original negligence in failing to put the bar in place. In fact it is not an intervening cause at all, but simply a condition, or an occasion, which made the injury possible, and a condition which ought to have been foreseen. The fact that the injury could not have occurred had the door remained closed, in no way serves to prevent the original cause from being the proximate cause. If the opening of the door be viewed, in the light of a cause, it is at most a concurrent cause, and the rule is well established that one is not relieved from liability for a negligent act, when some other cause is concurrent with the negligence in producing the injury. It is sufficient that the negligence occurring with one or more efficient causes, other than plaintiff's fault is the proximate cause of the injury so that where two causes combine to produce injury,

a person is not relieved from liability because he is responsible for only one of them (29 Cyc, 497 and cases cited there).

This brings us to the question as to whether the concurrent condition or cause was brought about by decedent's fault. We fail to see wherein he was at fault. He did not open the door. It was opened by Alva Moss and Emmett Whelihan. (Transcript 96, 106, 122, 137) When the door was within a foot or two of being open Early went to assist, but he **did not open the door,** and though he had, still, he would not have been at fault. The finding of the lower Court on that question is found on page 296 of the Trans.

Counsel for appellant in his brief lays great stress on the fact (as he sees it) that Early placed himself in a position of danger. But he overlooks the fact that the position was dangerous only because— **Petitioners' negligence made it so.** Did not Early have a right to assume, that the bar was in place for his protection as usual. He had seen that door opened many times during the five years in which he had crossed and recrosseed Humboldt Bay on the Antelope. He had (according to our testimony) always seen the bar in place. According to their testimony he had usually seen it in place. He had come to rely upon it as his protection. Opening the door, was not a faulty act, nor a negligent act on the part of Early, because he had absolutely no way of knowing that the bar would not be in place as usual, and he had a right to rely upon its being there as usual,

and the open doorway was safe **had the bar been there.**

Counsel for appellant in his brief before the District Court (page 13) quotes from Milwaukee Ry. vs. Kellogg 94 U. S. 469, 24 L., Ed. 256 as follows:—

> "But it is generally held that in order to warrant a finding that negligence or an act not amounting to a wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The attending circumstances here are that the door was invariably opened on the way over. (Trans. 84, 100, 102, 123, 148, 195, 280, 293) and the company had full knowledge of this fact, and they ought reasonably to have foreseen, that in opening that door the passenger engaged in the act, was apt to be thrown through the doorway either by a lurch of the ship or by losing his balance in the effort directed against the door. They ought to have foreseen too, that the door being opened all the passengers on the lower deck were exposed to danger if the bar were not in place.

In the case of Hanley vs. Eastern S. S. Co. a Mass., case reported in 109 N. E. 168. The facts are singularly similar to those in the case before us.

"There was evidence tending to show that there was, on a deck of the steamship where passengers were permitted to go, a space variously estimated at

from three to five feet between a lifeboat on one side and a life raft on the other, where there was no rail, guard or protection to prevent a passenger from walking, being thrown or falling over the ship's side to the water; that as the plaintiff's intestate, walking along at about 9 o'clock in the evening with a camp stool in his hand, was in the act of putting it down, the vessel gave a lurch and he fell overboard. If this evidence was believed, it was sufficient to support a finding of due care. It well may be found that a passenger upon an ocean-going steamship, during the voyage, may assume that no place where he is allowed to go will be left entirely without some construction to prevent a passenger from falling overboard."

We quote from P. 169.

> "The manner of the accident was not left wholly to surmise or conjecture. If the testimony just narrated were taken at its full value, it reasonably might have been thought to show that the plaintiff's intestate was caused to fall overboard by the lurch of the ship and not by his own volition or lack of attention."
>
> "It cannot be said as matter of law that he assumed the risk of such injury. If the jury believed that there was not adequate cause for him to know that there was no guard or protection, then there was no room for the operation of the maxim, "Volenti non fit injuria." Even though it may have been obvious that there was no chain or guard stretching over the space between the lifeboat and the raft, it might still have been

reasonable to assume that there was a rail or other protection at the edge of the deck."

"The jury rightly were instructed that the only negligence for which it could be held responsible was that of its servants or agents. But there were several hundred paassengers on this boat and necessarily some degree of inspection was required, in the exercise of the high responsibility resting upon the defendant as a common carrier, to see that the various parts and appointments of the vessel remained safe and were not put out of place or rendered dangerous by such ignorant or stupid persons as commonly might be anticipated among so large a number of passengers. The defendant was not obliged to act on the theory that passengers would wilfully remove guards placed for their protection; but if the danger that happened was one likely to occur, then the defendant would be required to provide against it, so far as reasonably possible. It properly was left to the jury to determine whether such reasonable inspection as it ought to have exercised, in view of the number of passengers carried and the nature of the particular place and its fittings, and the danger likely to follow from its becoming unguarded would have revealed the fact that the guard chain had become unfastened."

On the question of breaking casual connection, a very strong case in point is the Santa Rita 176 Fed. Rep 890, an admiralty case before circuit Judges Gilbert and Morrow, and District Judge Hunt.

Plaintiff's ship had been damaged by fire caused by burning oil floating on the water of San Francisco Bay. The oil had been carelessly thrown from the

Santa Rita. How it had been set on fire was not clearly established, but it was not contended that the Santa Rita had any part in setting fire to the oil. Now it would seem, that here was an intervening cause that would serve to break the casual connection between the original negligence and the injury. At least the facts are infinitely stronger along that line than in the case at bar, yet the court says:—

> "We are of opinion that the injury to the Boieldieu was the natural and probable consequence of the negligent act of the Santa Rita and ought to have been anticipated in the light of the surrounding circumstances. The circumstances which must be considered are the highly combustible nature of the oil, the condition of the tide and wind, the proximity of the wharf and shipping, the inflammable condition of the oil soaked wharf, and the many chances of accidental ignition to which the oil was exposed. Without doubt the natural and probable consequence of covering water with oil, might not under different circumstances, have had a natural tendency to produce any injury. If the oil had been dumped into the middle of the bay, far from any ship or wharf; if the wind and tide had been different; if the wharf had been fire proof; if the oil had been less inflammable; if the chance of fires had been much less—we might have reached a dierffent conclusion. But, considering all the facts and circumstances, we must conclude that the injury done by the floating oil ought to have been foreseen, and that, therefore, the placing of it on the water was the proximate cause of the injury inflicted by its ignition." (Milwaukee R. vs. Kellogg, 94 U. S. 469,

24 L. D. 256; Insurance Co. vs. Boon, 95 U. S. 117, 24L. Ed. 395; Washington & Georgetown Ry Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; McGill v. Michigan S. S. Co., 144 Fed 788, 75 C. C. A. 518).

So in our case the employees of Appellant ought to have foreseen in view of the fixed custom that the door would be opened and that the passenger opening it was liable to be thrown into the bay, if the bar were not in place; and that therefore the failure to place the bar was the proximate cause of the injury.

In Nehrens vs. Furnessia (35 Fed. 798) the facts are singularly similar to those in the case at bar:

Libelant, a steerage passenger on the steamship F., in coming down from the deck to go to his quarters, fell through the fore hatch in the lower between decks, breaking his leg, for which injury this suit was brought. The hatch was ordinarily kept covered, and passengers were in the habit of walking over it. On the occasion in question the hatch had probably been opened to bring up provisions, but there was no light to enable libelant to see whether the hatch was open, nor was there any rail or guard around it. The libelant testified that he had never seen the hatch open, and did not know that it was liable to be open. Held, that the vessel was liable for libelant's injury, his damages being fixed at $1,600.

The court says at page 799:—

> "The habit of passengers to cross the hatch cover could not have been unknown to the officers of the ship and in the narrow space available for steerage passengers its

use more or less for that purpose was almost inevitable. It was the clear duty of the ship to provide reasonable security against the danger when the hatch was temporarily open by means of a rail or guard of some kind, and by sufficient light to enable the unusual danger to be perceived."

ILLUSTRATIVE CASES

"Where a person, driving carefully along a narrow highway on a dark night, turned to the left to avoid going down an unrailed embankment on the right, and thereby came in collision with a carriage approaching from the opposite direction, and was injured,—the want of the railing was a "defect," and was the sole cause of the injury."

Flaggs vs. Hudson, 142 Mass. 280.

"Where a narrow embankment used as an approach to a railroad crossing had precipitate banks, and was unguarded by railings, the negligence of the city in so maintaining it was deemed a proximate cause of an injury to a traveler caused by his horse going over such embankment, rendering the city liable in damages, although the fright of the horse was a contributory cause."

Harvey vs. Clarinda, 111 Iowa, 528; 82 N. W. 994.

"In an action for injuries sustained by being precipitated into a stream adjacent to the street, which was not protected by a barrier, an instruction authorizing a finding for the defendant if the accident was occasioned

by by-standers endeavoring to assist the plaintiff by taking hold of her horse was properly refused, since the intervening act of a third party did not excuse the defendant from liability for its negligence in failing to erect the barriers which was a proximate cause of the accident."

San Antonio vs. Porter, 24 Tex. Civ App. 196; 59 S. W. 992.

"A street connecting with a bridge at an angle extended five or six feet beyond the line of the bridge, leaving an exposed place, which lead to one side of the bridge and across an unguarded abutment into the river. A pedestrian about to enter the bridge was suddenly confronted by a bicyclist, and, to avoid a collision, jumped to one side, and fell off the end of the street. It was held that, although the bicyclist had no right on the sidewalk, and the city could not have foreseen that he would be there unlawfully, he was not the proximate cause of the injury, but the proximate cause thereof was the city's failure to keep the abuttment guarded, which rendered the city liable."

Knouff vs. Loganport 26 Ind App 202; 59 N. E. 347.

But in the case at bar the appellant could readily foresee, that if it were one deck hand short, that it would not have any one to put up the barrier (the bar) and thereby protect their passengers. Appellant could readily foresee that if the barrier (the bar) was not put in place a passenger was liable to fall overboard; all this the appellant could readily foresee.

The object and purpose of the statute, rules and regulations requiring the petitioners to have two deck hands, was to protect the lives of the passengers. They violated the law in having but one deck hand, and instead of assigning him to look after the protection of the passengers they put him to taking up tickets, entirely disregarding the safety of their passengers. *Therefore the violation of the statute, rules and regulations by petitioners in navigating the vessel one deck hand short was the proximate cause* that resulted in the death of George D. Early.

The nearest—in point of time or space—may not be the responsible agency at all. But in this case the company is liable whether the violation of the statute be considered the proximate cause or whether the negligent act of failing to place the bar be considered the proximate cause.

(C) THE KNOWN CUSTOM OF PASSENGERS TO OPEN THE DOOR.

(1) How it affects the question of legal liability.

This is really only another way of asking whether the opening of the door ought reasonably to have been foreseen.

The undisputed evidence is and the lower court has found that the door was invariably opened by the passengers before reaching the landing, on those occasions when the door happened to be closed; (Trans. 84, 100, 102, 123, 148, 195, 280, 293) and the evidence conclusively shows this practice had been

followed by the passengers for a number of years and the custom was well known to the company. The legal effect of this custom, and the knowledge, is best brought out by the following excerpts from cases:—

> "Defendant piled lumber on a sidewalk in a public street in the vicinity of the homes of a number of children, with knowledge that the children were in the habit of congreating there and climbing on the lumber while at play. Plaintiff's intestate was killed by the falling of the lumber so piled; a verdict finding that the defendant's negligence was the proximate cause of the injury was justified. True etc., Co., v. Woda, 201 Ill. 315, 66 N. E. 309."
>
> "Plaintiff, a boy of four years, while passing along a highway climbed on a fence situated on defendant's adjoining land and separating it from the highway, for the purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell on plaintiff and injured him. It was held that as plaintiff in climbing on the fence was merely doing an act which defendant **ought to have contemplated as likely to be done by children** using the highway, defendant was not entitled to avail himself of the defense that the injury was caused by plaintiff's own act, and that plaintiff was entitled to recover."
>
> Harold v. Watney, (1898) 2 Q. B. 320, 67 L. J. Q. B. 771, 78 L. T. Rep. N. S. 788, 46 Wkly Rep. 642.

Petitioner and appellant in this case have no reason to urge the opening of the door to excuse them from the effects of their negligence. It is only a condition or a circumstance in the chain of events, and

moreover a circumstance which should have been foreseen and which was almost sure to happen. The lower court in its findings uses this language:—

"The custom of so opening said cargo port door was well known to all the officers and employees of the boat and was also known to Captain Walter Coggeshall, the president of Coggeshall Launch Company."

In Ind. St. Ry. Co. vs. Robinson, (61 N. E. Rep. 936) the Court said;

> "But appellant **was bound to know** that crowds might congregate upon its platform and injury to its intended passengers might result from defects in its platform under such circumstances. The presence and struggle of crowds to get upon appellant's car only increased the danger of accident. It did not excuse or relieve appellant from responsibility for such accident."

So in the case of Catherine Glen vs. Boston Elevated Ry. Co., 32 L. R. A. (U. S.) 470, also 207 Mass. 497, the Court said;

> "A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business, to carry passengers in safety to their destination and to enable them to alight there with safety. This extraordinary vigilance is owed not only as to its own instrumentalities and employees, but also as to **other passengers** or strangers so far as any harmful misconduct on their part **may be foreseen** and guarded against."
>
> And again at p. 474; "Evidence as to what has been the custom of a crowd at a

particular place or under special circumstances in boarding defendant's cars was competent because a Ry. Co. has **reasonable cause to know what has been habitually done respecting its cars.** It bore upon the care which defendant ought to have exercised, and the protection it ought to have furnished to its passengers who were entitled to alight."

ILLUSTRATIVE CASES ON CUSTOM.

Where it is shown that passengers were in the habit of alighting at a point a short distance from a station and on the side opposite thereto where there was a parallel track, and such custom was known to the Ry. Co. the act of a passenger in alighting at such a place is not, as a matter of law, negligence, and where such passenger was struck and run over by a train on a parallel track, question of negligence was for a jury, and judgment for Plaintiff was affirmed. (Penn. Co. vs. McCaffery 173 Ill. 169, affirming 68 Ill. App. 635).

Where a railroad Co. was in the habit of obstructing street crossings with its trains, and the public were in the habit of climbing over, crawling under and going around trains, to cross track, it was the duty of the Co. to move such trains, in accordance with the known custom of the people and to take such care to avoid injury to persons who might attempt to cross behind such trains. (A. T. & Santa Fe Ry. vs. Cross, 58 Kan. 424).

If, a custom among street Ry. employees, known

and assented to by the company, those who are on duty are in the habit of calling for and receiving assistance from those not on duty, and one of the latter renders the assistance asked, he will be regarded as in the company's employ for such service and if he negligently abandons it whereby injury to passengers occur, the company will be liable. (Leavenworth Electric Ry. Co. vs. Cusick 60 Kansas 590).

Where a boy, eight years of age, crawled under cars that blocked a street crossing, and was run over by an engine backing against cars, it was error to direct verdict for the Co. as the question of negligence was for the jury, where it appeared that it was the custom of persons in the neighborhood, to crawl under cars when the street was blocked. (Hofler's Adm'r. vs. So. Ry. Co., 31 Ky. Law Rep. 1020).

Where the public has, for years used a Ry. bridge or track as a footpath without objection by the Ry. Co., and by reason of such custom, people may be expected thereon, it is the duty of those in control of passing trains, in view of such custom, to use reasonable precautions to prevent injury to such people **even though they be trespassers.** (Young vs. Clark 16 Utah 42, also 3 Am. Neg. Rep. (new series) 315).

Long continued custom is evidence of invitation to board trains at a particular place.

Chicago Etc. vs. Dean, 195 Ill. 168.
American Etc. vs. Resley, 175 Ill. 295.
Carver vs. Minn. Ry. Co., 120 Iowa 346.

(2) WHAT IS THE LEGAL EFFECT IF DONE CONTRARY TO ORDERS.

In the first place there is not a scintilla of evidence that Early ever heard an order not to open the door if one were ever given. The District Court has found (Trans. 294) that George D. Early, deceased, had never had any knowledge or notice of any efforts made by the officers and crew to prevent passengers from opening the door. There is no evidence that any such order had ever been posted. There was some evidence (denied by witnesses for claimant) that such a request had been made to some of the passengers. But when it had been made or who heard it, if made, does not appear. We deny that such request had ever been made, but for the sake of argument let us assume that a request of that kind had been made; Let us go further and assume that Early had heard the request. The fact is that the door was opened regularly by the passengers **just the same.**

Quoting from RULING CASE LAW, Vol. 5, page 23:—

> "There can be no doubt, however, that a carrier after making a rule in regard to the conduct of passengers may waive and abandon it and treat passengers as if it had never existed and thus lead them to believe that the rule is no longer in force. If the carrier does this, it cannot set up the rule to defeat the rights of a passenger who has acted in the well warranted belief that the rule is not in force."

In Kane v. Erie Ry. Co. (C. C. A.) 142 Fed. 682, the question of negligence arose where, if defendant had a rule or an order, which was habitually broken by deceased, and that fact was known to defendant. We quote from the syllabus only:—

> "Plaintiff's intestate, who was a fireman on an engine on defendant's railroad, was killed while his train was in the yards of the company, as the result of a collision alleged to have been caused by the negligence of the engineer of another train. Deceased was at the time standing on the running board on the front of his engine cleaning the headlight or number plate, and the engine was backing very slowly, drawing a number of cars after it. It was clearly shown that it was the custom of firemen on defendant's road to do so during the day, sometimes while the engines were in motion, and that such custom was known to and sanctioned by the company, although a rule provided that firemen should clean the engines 'at the end of the trip.' Held that, **in view of such general custom, which in effect abrogated the rule,** the deceased could not be said as matter of law to have been guilty of contributory negligence in being in the position where he was at the time of the collision, but that such question was one for the jury."

Again in Carver v. Minneapolis and St. Louis Ry. Co., 120 Iowa 346, also in 14 Am. Negligence Reports vol. 14 (current Series) P. 33, the Court says:—

> "Plaintiff was not bound to assume, that because on previous occasions the defendant had allowed the mail bags to be thrown from its trains in a negligent way,

such negligent conduct would be continued, but had a right to assume that it would be discontinued.

"BUT even if the mail bags had never before been thrown so as to imperil a person at the north end of the platform, in the exercise of reasonable care on the part of defendant, it would have anticipated an accident as likely to occur at that place from the general practice of throwing the mail bags from the train while in motion. The general practice was negligent; it imperiled the safety of persons on the platform; and we do not think that the jury was bound by the instruction to say that, if the bags had never before been thrown off at the north end of the platform, the usage, if persisted in, was not likely to imperil persons standing at that place. **It was the general usage of throwing bags from the train while in motion, and not the usage of throwing them to the middle of the station platform,** which constituted the negligence properly complained of."

So in this case it is the general custom of allowing passengers to open the door that is negligence, and not the one opening of the door at the time of the injury.

But even stronger is the case of Weisshaar vs. Kimball S. S. Co. 128 Fed. Rep. 401. A case in which an officer of the boat started to carry passengers in a small boat out to the ship lying at anchor. The testimony showed that the officer warned the passengers before starting that the small boat was overloaded and ordered or requested some of them to get out. In spite of his orders 18 persons remained in the boat while its capacity was only 14, in consequence of which plaintiff's intestate was drowned.

The District Court (Judge De Haven) held that in disobeying the order, deceased assumed the risk and no recovery could be had (123 Fed. Rep. 838).

The Circuit Court (Gilbert and Ross, Circuit Judges) reversed the decision (128 Fed. Rep. 400). The opinion is written by Ross, Circuit Judge, in which he says:—

> "It was the clear duty of the officer, in the first place, to have stopped the entry of more than the boat's complement of men. According to his own testimony, he made nothing more than a milk and water protest against the entry of any one; and even if there had been on the part of the passengers an effort to over power the officer and force their way into the boat—of which there is not the slightest evidence—**it still remained the imperative duty of the officer in command to refuse to start the boat until enough of the people had gotten out to make it safe.** Not the slightest attempt appears to have been made by the officer to perform his duty in that regard, and for his gross negligence in that respect, as well as in failing to return to shore while he yet had sufficient opportunity; the ship is clearly liable, for, even where an injured party is guilty of contributory negligence, such negligence will not defeat the action when it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

Grank Trunk Ry. C. v. Ives, 144 U. S. 408.

12 Sup. Ct. 697.

36 L. Ed. 485.

Louisville & Nashville Ry. Co. v. East Tennessee, V. & G. Ry. Co., 60 Fed. 993.
I. C. C. Ca. 314.
Harrington v. Los Angeles Ry. Co. (1903) Cal. 74.
Pac. 15.

This doctrine, which is well established, fits the present case exactly. The case of Lynn v. Southern Pacific Co., 103 Ca. 7, 36 Pac. Rep. 1018, 24 L. R. A. 710, is, in principle, also precisely in point. In that case the plaintiff passenger was unable to find room inside a car, and therefore stood upon the platform, from which he was thrown and injured; the evidence tending to show that the train was going at excessive speed. In affirming a judgment for the plaintiff, the Supreme Court of California said:

> "The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, **it had the right to refuse to move the train under such circumstances**; but, if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platform, it was under obligation to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the over crowded condition of the cars."

So, here, as has already been said, if the officer in command of the boat had been unable to prevent overloading (of which, however, here was no evi-

dence), it was still his right and imperative duty to refuse to start the boat until enough of the passengers had gotten out to make it safe to do so. There is nothing in the record to justify the contention that such action on his part would not have been acquiesced in and conformed to. But speculation on that point is no answer to the gross neglect of duty on the part of the officer of the ship.

> "With regard to the question as to the duty of a carrier to take active measures to prevent a passenger from going into a dangerous place as distinguished from the question of the negligence of the carrier in allowing the place to become dangerous, it has been laid down that a carrier does not discharge its entire obligation by giving notice of a certain rule as to where passengers may go, and, if the custom of passengers to disregard the rule is so common as to charge the servants of the road with notice of it, then it is the carrier's duty either to take active measures to enforce the rule, or to make the disregard thereof safe. (Chicago etc. Ry. Co. v. Lowell, 151 U. S. 209, 14 S. Ct. 281, 38 U. S. (L. Ed.) 131).

So in the case at bar, it became the imperative duty of the officers and servants of Petitioners and Appellant to **prevent** the opening of that door when they knew that the bar was down. A mere milk and water protest on their part issued perhaps months or years before cannot now be used to excuse them from the result of their own gross negligence. It is weak and silly for them to say that they could not prevent the passengers from opening the door. If

they are unable to enforce rules which are made to protect passengers from known danger then they have no right to be in the business of carrying passengers. Consider for a moment one of the great companies engaged in ferrying passengers between San Francisco and Oakland. Consider the great crowds that they daily and hourly control. Imagine one of those companies coming into court with a plea that it was unable to enforce a regulation made for the safety of passengers. Yet here is this petitioner and appellant admitting that they could not or at least did not control a few mischievous boys. Such weakness is in keeping with the disregard of human life shown by running one man short, and leaving the protecting bar out of place. The fact that they have operated the Antelope for so many years with that door open, and have carried something like 300,000 passengers (according to the mathematics of counsel) without an accident, proves that the bar was a most effectual safeguard, and the fact that an accident happened the first time it was down, proves that the place was dangerous without it, and that it was gross negligence to leave it down. Res Ipsa Loquitur.

And if it be true that the bar had been left down on other occasions, then they escaped accident by good fortune which they ill deserve. And should they escape the payment of monetary damage in this case it is safe to assume that they will go merrily on, disregarding rules, regulations, statutes, and precautionary measures, depending on their good for-

tune, until some other victim or victims be offered on the altar of corporation greed and carelessness.

We submit that the evidence fully sustains the findings of the Honorable District Court.

6th SUBDIVISION.

THE ELEVENTH ASSIGNMENT OF ERROR.

> 11. "The said District Court erred in find-
> "ing that the petitioner Coggeshall Launch
> "Company had not protected and warned
> "passengers against opening of the cargo-
> "port door by said passengers and there-
> "upon rendering judgment in favor of said
> "claimant."

The finding of the Honorable District Court is as follows:

> "That the said passenger, George D.
> "Early, deceased, had never had any notice
> "or knowledge of any efforts made by the
> "officers and crew of the said ferry-boat
> "'Antelope' to prevent the passengers
> "thereof from opening the said cargo-port
> "door, either by the posting of notices or
> "otherwise."

We submit, that there is not a scintilla of evidence in the whole case, that shows or tends to show that the passenger George D. Early ever had any notice or knowledge of any efforts made by the officers and crew of the said ferry-boat "Antelope" to prevent the passengers thereof from opening the cargo-port door, either by posting notices or others. This being the fact the findings of the court is sustained by the evidence in this particular.

7th SUBDIVISION.

THE TWELFTH ASSIGNMENT OF ERROR.

This assignment is as follows:

> "The said District Court erred in find-
> "ing that knowledge of the custom of pas-
> "sengers opening the cargo-port door
> "against orders of the petitioner Cogge-
> "shall Launch Company was negligence by
> "the said petitioner and thereupon render-
> "ing judgment in favor of said claimant."

The finding of the Honorable District Court, which this assignment of error assails is in the words as follows:

> "That the said cargo-port door was in-
> "variably opened by some one of the pas-
> "sengers before reaching the Eureka dock,
> "usually being opened when the landing
> "whistle was blown. That immediately
> "(241) upon the blowing of the whistle, on
> "said steam ferry-boat 'Antelope', for land-
> "ing and while still in the open water of
> "the bay at some distance from the dock,
> "some passenger or other would open the
> "said cargo-port door was not a casual oc-
> "currence, nor even merely a frequent oc-
> "currence, but was an invariable custom
> "that had been in vogue for a number of
> "years. This custom of so opening the said
> "cargo-port door was well known to all the
> "officers and employees of the said steam
> "ferry-boat 'Antelope,' and was also known
> "to Captain, Walter Coggeshall, the presi-
> "dent of petitioner, Coggeshall Launch
> "Company."

This finding of the Court is fully sustained by the evidence; in fact, we are safe in saying that it

is in no way denied and is virtually an admitted fact in the case.

8th SUBDIVISION.

THE THIRTEENTH ASSIGNMENT OF ERROR.

The thirteenth assignment of error is couched in the following laugnage, viz:

> "The said District Court erred in find-
> "ing that the death of George D. Early re-
> "sulted from a failure by petitioner Cog-
> "geshall Launch Company to prevent the
> "continuance of the custom of passengers
> "to open the cargo-port door and there-
> "upon rendering judgment in favor of said
> "claimant."

We submit that the foregoing is not a fair assignment of error on the findings of the court. For, in no place does the Hon. District Court find as a fact "that the feath of George D. Early resulted from "a failure by petitioner Coggeshall Launch Com-"pany to prevent the continuance of the custom of "passengers to open the cargo-port door."

Here are the findings of the court as to what the death of George D. Early resulted from, found on page 296 of the Transcript, viz:

> "That in operating the said steam fer-
> "ry-boat 'Antelope' on the voyage, day and
> "evening hereinbefore found, one man short
> "contrary to the requirements of law, re-
> "sulting in the fact that the bar across the
> "said cargo-port door opening was not in
> "place; and leaving the dock at Samoa with-
> "out having the said bar in place across the

> "cargo-port opening some six or eight feet "wide, leading directly to the water, on "said lower deck of said ferry-boat then "filled with passengers, under the then ex- "isting and prevailing conditions, the said "petitioner, Coggeshall Launch Company, "and its said steam ferry-boat 'Antelope' "was guilty of gross and inexcusable care- "lessness and negligence, and her said pas- "senger George D. Early was drowned by "reason of said carelessness and negli- gence."

Therefore it can be readily seen that the thirteenth assignment is not in accord with the actual facts found and therefore the assignment of error cannot be allowed. And further, this finding is fully sustained by the evidence.

9th SUBDIVISION

THE FOURTEENTH ASSIGNMENT OF ERROR.

The fourteenth assignment of error is as follows:

> "The said District Court erred in find- "ing that the claimant was damaged by pe- "titioner Coggeshall Launch Company in "the sum of $5,000 and thereupon rendering "judgment in favor of said claimant."

We submit that the finding of the Court that claimant was damaged by petitioner Coggeshall Launch Company in the sum of $5,000.00 is fully sustained by the evidence. And therefore to cite facts and authorities in support thereof are wholly unnecessary.

10th SUBDIVISION.

THE FIFTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

> "The said District Court erred in find-
> "ing that the death of George D. Early re-
> "sulted from the negligence of the petition-
> "er Coggeshall Launch Company in operat-
> "ing the steam vessel 'Antelope' with a
> "crew one man short, the failure to have
> "another member to perform the duties of
> "said absent member of the crew and to
> "put the bar in the cargo-port door of steam
> "vessel 'Antelope', and to thereupon ren-
> "der judgment in favor of said claimant."

The finding of the Court on this, as on other points, is fully sustained by the evidence.

(1) There are two causes of the injury viz; running one man short in violation of the statute; and failure to put up the bar. Either of these may be considered the proximate cause of the injury and either or both constitute negligence on the part of appellant for which they are legally responsible.

(2) The fact that the door was closed does not relieve them from liability because they knew that the door would in all human probabilities be opened before the voyage ended.

(3) The opening of the door does not break the causal connection between the negligent act of failing to put the bar in place and the injury, because the opening of the door was merely a circumstance or condition which ought reasonably to have been foreseen.

(4) There is no assumption of risk or contributory negligence because the opening of the door was not an act of negligence of decedent. The decedent had a legal right to presume that the bar was in place for his protection, and the open doorway with the bar in place was not dangerous. Decedent could assume no risk of a danger of which he had no knowledge and one which was caused by petitioner's negligence in failing to put up the guard rail.

The material facts in the case are not seriously disputed. The District Court has made its findings of fact and we assume that the appellate court will not go back of that finding. That they were running one man short is admitted. That they failed to put up the bar is admitted. That the bar was **always** up when the door was closed is disputed and that it was usually up is admitted. That it was the fixed custom for passengers to open the sliding door is admitted, and that the company knew of this custom is admitted.

They seek to avoid responsibility for not putting the bar in place by pointing to the fact that the door was closed. We answer that the closed door did not give protection beyond a certain point in the voyage, and this was known to the company, it was therefore negligence for them to leave Samoa without the bar being up. If that be true and their negligence was the proximate cause of the injury then they are liable.

Island and Seaboard Coasting Co. vs. Tolson, 139 U. S. 551.

Ellsworth vs. Hunt, 168 Fed. 506.
City of Winona vs. Botzel, 169 Fed. 321.
Southern Pacific Ry. Co. vs. Cavin, 144 Fed. 348.

N. Jersey Ry. C. vs. Purdy 142 Fed. 955.

The decision of the case in the District Court evidently rested upon a consideration of two questions:—

1. Liability imposed by violating the statute.

2. Liability imposed by failing to put the bar in place.

LIABILITY IMPOSED BY VIOLATION OF A STATUTE.

(A) Was there a casual connection between the shortage and the accident.

We wish to call the court's attention to the finding of the lower court on this question found on page 295 of the Transcript in the following language:—

> "That the said steam ferry-boat 'Ante-
> "lope' on the said voyage and evening when
> "the said passenger George D. Early, now
> "deceased, was drowned, as hereinbefore
> "found was being operated with one man
> "short contrary to the requirements of law,
> "and that it was owing to the absence of this
> "man, was due the fact that the said bar
> "was not in place across said cargo-port
> "door opening on said lower deck of the said
> "steam ferry-boat."

We hold in this case that there is unquestionably such a connection. It cannot be denied that had the

bar been in place the accident would not have happened. The evidence on behalf of claimants shows that before the night in question the bar had **always** been placed in position **by Nick**, the absent deckhand, regardless of whether the door was open or closed. If we believe the testimony of claimant's witnesses then unquestionably Nick would have placed the bar as usual had he been there. But Appellant's witnesses testified that Andrew, not Nick, usually placed the bar in position. Very well, then Andrew failed to put the bar in place because he was taking Nick's position, that of collecting tickets, and it is but a lame excuse for petitioners and appellant to say that having been negligent in running one man short, they permitted the other man to leave his usual post of duty to take tickets, thereby admitting that they gave more care to the collection of tickets than to the safeguarding of human lives. If they removed Andrew from his (according to their testimony) duty, which was to put the bar in place to fill that left vacant by Nick, thereby caring for the dollars in utter disregard of human lives, then they were guilty of such gross and even criminal negligence as to call for a punishment more severe than the payment of monetary damages.

We do not overlook the fact that some of Appellant's witnesses testified that on some other occasions the bar had been left down when the door was closed. If their testimony be true, then all we can say is that on these particular occasions, the passengers were left without any protection whatever after

the landing whistle sounded and the passengers had opened the cargo-port door according to their regular custom. Even if the testimony be true, deceased was not bound to assume that because on some other occasions they had been negligent, such negligence would continue. (Carver vs. Minneapolis Ry. Co. 120 Iowa 346). And negligence on former occasions is no excuse for negligence on this occasion. We cannot believe their testimony however, because we cannot bring ourselves to believe that any person to whom had been intrusted the care of passengers would have such an absolute disregard for the preservation of human lives. If a man were on duty entrusted with the care of putting that protecting bar in place, then we can scarcely conceive of his disregarding so important a duty. The only reasonable explanation of the missing bar lies in the fact that the man was not there to put it in place. If that be true then there is no question of the causal connection between the shortage of one man and the accident.

If it were Andrew's duty to place the bar, and Andrew was removed from his post of duty to fill the post left vacant by Nick, then the causal connection between the shortage and the accident is clearly established.

(B) DID THE SHORTAGE OF ONE MAN CONSTITUTE NEGLIGENCE PER SE.

The statutory requirements are as follows:

Any vessel of the United States subject

to the provisions of this title or to the inspection laws of the United States shall not be navigated unless she shall have in her service and on board such complement of licensed officers and crew as may, in the judgment of the local inspectors who inspect the vessel, be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to the right of appeal, under the regulations to be made by the Secretary of Commerce, to the supervising inspector and from him to the Superior Officer to set aside or affirm the said determination of the local inspectors.

If any such vessel is deprived of the services of any number of the crew without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage; PROVIDED, that the master shall ship, if obtainable, a number equal to the number of those whose services he had been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew to the local inspectors within 12 hours of the time of the arrival of the vessel at her destination, he shall be liable to penalty of $100.00, or, in case of an insufficient number of licensed officers, to a penalty of $500.00 (Rev. Stats. 4453).

In case of desertion or casualty result-

> ing in the loss of one or more seamen the master must ship, if obtainable a number equal to the number of those whose services he had been deprived of by desertion or casing and equally experienced with those whose place or position they refill, and report the same to the United States consul at the first port at which he shall arrive without incurring the penalty prescribed by the two preceding sections. (Rev. Stats. Sec. 4516 Acts of July 5, 1884 and Fed. 14, 1903).

The requirement that the vessel have two deckhands has the force of law. (71 Fla. 210).

There is no question but that in running one man short petitioners were violating a statute, and the violation of a statute is universally considered negligence per se in those cases where damage results from such violation. The rule is to be found in both State and Federal decisions repeated many times. It is well stated in a California decision, **Siemers vs. Eissen 54 Cal. at P. 420** from which we quote as follows:—

> "The failure of any person to perform a duty imposed upon him by statute or other authority should always be considered evidence of negligence, **or something worse.** Whether it constitutes such negligence as tended to cause the injury to the Plaintiff, in any particular case is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the State, if not of individuals; when no evil intent appears, the omission may properly be regarded as simple negligence. The

omission to perform a legal duty being proved, the Plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant. Thus, if a railroad Co. is required by law to fence the track, to ring bells, or to give other warning of danger or if one building a wall is required to make it of a certain thickness; or if obstruction to a street is prohibited, a violation of any of these legal regulations is sufficient evidence of negligence."

(Sherman & Redfield on Negligence, Par. 13a).

"So if a specific duty is imposed upon any person by law, or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty." (Id p. 54a).

"It is an axiomatic truth that every person while violating an express statute is a wrong doer, and as such is ex necessitate negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." (Jetter vs. N. Y. & Harlem Ry. Co. 2 Abbot 464).

It is also discussed in Thompson on Negligence, 2nd Ed. Par. 10. That the failure of any person to perform a duty imposed by statute or legal authority is sufficient evidence of negligence, has been repeatedly declared by the California Courts:

McKune vs. Santa Clara V. M. & L. Co. 110 Cal 481.

Craig vs. Los Angeles Etc. 154 Cal. 663.

Simonean vs. Pacific Electric Ry. Co. 166 Cal. 269.

James vs. Oakland Traction Co. 10 Cal. App. 785.

Fenn vs. Clark 11 Cal. App. 81.

Scragg vs. Sallee 24 Cal. App. 144.

Slaughter vs. Goldberg 26 Cal. App. 327.

Hayes vs. Mich. Etc. 111 U. S. 240.

Driscoll vs. Cable Ry. Co. 97 Cal. 553.

(The Farragut 10 Wall. 334).

11th SUBDIVISION.

THE SIXTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

> "The said District Court erred in not "finding that (252) the death of George D. "Early resulted from the contributory neg- "ligence of said George D. Early in that he "assisted in creating the open unprotected "doorway through which he fell to his "death, and in that he approached a door- "way which, was apparent to said George "D. Early, was unprotected."

CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

On this question the District Court has found as follows: (Trans. 296).

> "That the said George D. Early, now "deceased, did not open the door at the "place where he fell through, and he did not

"contribute in any degree to the lack of "protection at said place on said ferry-boat, "'Antelope,' occasioned by the absence of "said bar."

Definition:—Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or co-operating with the negligent act of defendant is the proximate cause or occasion of the injury complained of.

29 Cyc 505 and cases and authorities there cited.

An essential requirement is that the act of the person injured must be a **negligent** act. It is not sufficient merely that the act contribute to the injury, as it is the contributory **negligence** and not the contributory act which defeats recovery. Contributory negligence necessarily assumes negligence on the part of the defendant. If, therefore defendant pleads and argues contributory negligence as a defense in this case, he must therefore first admit negligence on his own part.

While in most jurisdictions contributory negligence will defeat recovery it is not so in Admiralty. There the doctrine of comparative negligence still prevails.

"The rule that contributory negligence "bars a recovery is not applicable in admir- "alty."

The Wanderer, 20 Fed. Rep. 140.
The Explorer, 20 Fed. Rep. 135.

The James M. Thompson, 12 Fed. Rep. 189.

The Mabel Comeanx, 24 Fed. Rep. 490.

Counsel for petitioners argues strenuously and at length, that Early's death was caused by his own negligence and that therefore he is barred, and that his negligence consisted in:—

(1) Taking a dangerous position.

(2) Disregarding orders not to open the door.

(3) In failing to use his faculties and observe the danger.

In answer to his first line of argument viz: that Early took a dangerous position, nothing more is necessary than to point out the position taken by Early was absolutely safe **had the bar been up.**

The general rule is that every person has a right to presume that every person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty to such other person.

29 Cyc. p. 516 and numerous cases there cited.

Failure to anticipate defendant's negligence does not amount to contributory negligence.

Dixon v. Pluns 98 Cal. 384; 20 L. R. A. 698.

District of Columbia v. Bolling, App. Cas. (D. C.) 397.

Mahan v. Everett 5 La. Ann. 1162; 23 So. 883.

Healey v. Ehret 58 N. Y. Suppl. 917.

Dohn v. Dawson 35 N. Y. Suppl. 984.

This is especially true where a defendant by his conduct has thrown the person injured off his guard, so that the want of diligence was the consequence of defendant's conduct.

29 Cyc. 517 and cases.

Early had for five years, been riding back and forth on the "Antelope" daily, and had been accustomed to open the door or see it opened and had always relied on the bar; so on this occasion he was thrown completely off his guard, by relying on the protection of the bar. (Trans. 79, 95, 96, 100, 101, 120, 123, 139, 147).

Counsel's argument of contributory negligence on th eground of Early's disobeying "orders", have been completely answered heretofore.

FAILURE TO USE HIS FACULTIES.

While we are aware that failure to use one's faculties to observe a danger is many times held to be contributory negligence, yet those are cases in which the danger was open and the circumstances were such that a person using ordinary care would have seen and avoided the danger. But in this case Early had no chance to use his faculties. The dangerous character of the place was not revealed **until the door was opened.** He was pushing with his left hand with his back toward the place where the bar should have

been. This is shown by the fact that he fell backwards into the water. (Trans. 107, 132, 140, 152, 122, 137). There is no evidence that he had any opportunity to observe the absence of the bar, and we must always remember that the burden of proving contributory negligence is upon Petitioners. The presumption always is that a person used ordinary care to protect his own life.

The true test of whether one is guilty of contributory negligence is not what would be done by a prudent man generally, but what a man of ordinary prudence and care would do under similar circumstances.

Missouri etc. Ry. Co. vs. Wylie, 26 S. W. Rep. 85.

Where the danger is not so obvious that a person should have seen it in the exercise of ordinary care, failure to discover it is not negligence, and if the conditions are such as to mislead a person for failing to look for danger, when under the surrounding circumstances he had no reason to apprehend any, it is not negligence.

29 Cyc. 514 and cases cited.

Who can say in this case, that Early had a chance to use his faculties. Any one, no matter how prudent, under similar circumstances might have been projected through the unprotected doorway by the same force (Whatever it was) that sent Early to his death. The fact that the two young men who did open the door, were not thrown into the water is due,

no doubt, to the fact that they faced the unprotected doorway while Early had his back to it. (Trans. 122, 132, 134, 137, 140, 155).

While in the Federal Court contributory negligence is a defense, yet the burden of proof of contributory negligence is upon the defendant. Reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party. (Wabash Ry. Co. vs. Central Trust Co. (c. c.) 23 Fed. 738.

Courts of admiralty have such greater power than courts of common law in dividing the damages in accordance with the fault of negligence which is properly to be charged to either party.

Quoting from The Steam Dredge No. 122 Fed. at P. 687:—

> "Although the libelant placed himself in a position of some danger, he clearly did not appreciate the great danger he was actually in for he did not know it, and did not have reason to know it. Under the doctrine of the cases which we have cited, while he is charged with notice of some danger, he did not appreciate the risk he was taking for he did not know the danger he was actually as suming."

In Ward vs. Damp. Kjoebenhaven 136 Fed. 502. A case in which the facts seem to present a much stronger case of contributory negligence than the case at bar. In that case the decedent was warned of the danger yet the court there says;

> "Contributory negligence is a defense in a Federal Court but the burden of proof

> is upon the defendant. The **presumption** that the decedent used due care is in his favor. If Dr. Ward knew and appreciated the danger surrounding him, which caused the injury, then he may be held to have voluntarily assumed the risk; but mere notice that there was some danger without appreciating the extent of it will not of itself preclude a recovery, citing Firkett vs. Fibie Co. 91 Me. 268; 39 Atl. 996.
>
> "Contributory negligence is not found in a failure to exercise the best judgment or to use the wisest precaution, but allowance must be made for the extent of information one may possess of the nature of the danger by which he is surrounded, or as to whether he fully realizes from his limited knowledge what he shall do to avoid the danger."

In Winters vs. Baltimore & O. R. Co. (177 Fed. 46) the question arose as to whether riding in a dangerous place constituted contributory negligence; the court held that the fact that plaintiff was accustomed to ride there and that this custom **was known** to the employees of defendant were elements in determining whether as a matter of law there was contributory negligence. The Court says:—

> "Under all the circumstances of this case, especially in the absence of clear proof that Winters knew or had reason to know that this crossing had not been put in safe condition after he saw the last work done on it, and in view of the previous habits of employees of riding on the top of the cam car with the knowledge both of the conductor and the section foreman; under such circumstances, a license to ride upon the top

of the car may, it seems, be fairly implied. Ellsworth vs. Metheney (104 Fed. 119, 122; 44 C. C. A. 484; 51 L. R. A. 389)

It should have been left to the jury to say whether in thus riding upon the top of the car, he was, under the circumstances, guilty of negligence of which the injury received was the natural and probable consequence which ought to have been foreseen in the light of the attending circumstances, so as to make it a proximate cause of the injury and bar any recovery to which he might otherwise have been entitled."

"The defendant's argument that if the plaintiff was guilty of negligence in reference to the condition of the track, which was a proximate cause of the injury, Winters must necessarily also have been guilty of negligence contributory to the injury, fails to take into account; (1) The fact that Winters' contributory negligence is to be determined not merely by such knowledge as he may have had of the condition of the track, but also of the rate of speed at which the train was moving and all the other surrounding circumstances at the time of the accident, and (2) the different degree of care required of master and servant in reference to discovering or knowing the dangerous condition."

In reference to this last question, the court said in Railway Co. vs. Jarvi (53 Fed. 65, 3 C. C. A. 433).

"But the degree of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance required of the master and servant, in a particular case, may be and gen-

> erally are widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant himself in a case where the primary duty providing a safe place or safe machinery rests on the master, that reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnished it than if placed in that of the servant who occupies it."

So in the case at bar in considering the question of contributory negligence, the court must consider all the surrounding circumstances viz: The custom of passengers to open the door. The fact that on other occasions when the door had been opened the bar was up; the knowledge on the part of petitioner's and appellant's employees that the bar was not up; the lack of knowledge of that fact on decedent's part; and finally, the higher degree of care and greater responsibility imposed upon petitioners and appellants.

ANALYSIS OF APPELLANT'S ARGUMENT ON CONTRIBUTORY NEGLIGENCE.

Counsel for appellant in his brief has used a very ingenious argument in trying to prove that Early, the deceased, was guilty of contributory negligence. He

picks out one particular isolated fact or circumstance in connection with Early's death. He calls that a factor. He then proceeds to cite other cases wherein that particular factor was present, and wherein the court found contributory negligence. He ignores other facts and circumstances of that particular case. He then picks out another factor of the Early case and does likewise, and so on until he has found that in all of the factors of the Early case, as thus selected by him, have likewise been factors in some other case or cases wherein the court has found contributory negligence. He utterly ignores that portion of the case that takes it entirely out of the realms of contributory negligence, and then he reasons, that as the Early case is equal to the product of factors, as adroitly arranged by counsel, and each factor has been held to be a factor in making up a contributory negligence in some other case, though the facts were altogether different there, therefore there must have been contributory negligence by decedent in the case at bar. This may be good mathematics, but, is poor law. Negligence whether contributory or otherwise is never absolute. It is not founded on any rule of law. It is always relative, and is to be determined **from the surrounding circumstances of each particular case.** The trial court has found that.

"The said George D. Early, now deceased, did "not open the door at the place where he fell through "and he did not contribute in any degree to the lack "of protection at said place in said ferry-boat occa- "sioned by the lack of said bar." (Trans. 296) And

again the trial court finds "and her said passenger "George D. Early was drowned by reason of said "carelessness and negligence," (Trans. 296). These findings are amply sustained by the evidence, and certainly both of these findings, negative contributory negligence; and certainly the trial court is always in a better position than the appellate court to determine a question of this kind. The trial court in this particular instance was in a position to determine this particular question with unusual certainty. The court on motion of counsel for appellant, and at his request, was taken to the steamer "Antelope," and there at the open doorway in the presence of the court and both counsel, and the President of the Coggeshall Launch Company, the witness, Joseph Whelihan, Emmett Whelihan and Alva Moss, took the same position assumed by them at the time of the accident. The spot where Early stood before approaching the door; His position when pushing the door; His position in falling through the doorway were all pointed out to the court, and told more clearly than volumes of written testimony could tell of, **all the surrounding circumstances**. And in the light of all the evidence and surrounding circumstances the trial court found that there was no contributory negligence.

For the appellate court to find contrary to the trial court, would require a great preponderance of evidence. But there is no such weight of evidence to show contributory negligence on Early's part,—

Counsel urges that Early's contributory negligence consisted in

(1) Assuming a dangerous position.
(2) In failing to use his faculties.

His assuming a position which counsel calls "dangerous" was not a negligent act on Early's part, for as we have before pointed out the position which he assumed was safe had the bar been in place, and Early had a right to assume that it was in place. The trial court set forth that fact very clearly in its written opinion in the following language at page 285 of the Transcript.

"Nor can it be said that the mere approach of de-
"ceased to the opening already made by others was
"negligent, as he had every reason to suppose that
"there was no danger in so doing, for at all times
"theretofore the bar had been in place. Nor was he
"bound **under all the circumstances** to assure him-
"self that the bar was not in place at that time, be-
"cause he was bound only to the exercise of such
"care, as an ordinary prudent person would have ex-
"ercised under the circumstances. He could not an-
"ticipate and was not bound to anticipate that the
"vessel had left Samoa with this doorway unpro-
"tected. He with the other paassengers had become
"so accustomed to the presence of the bar that he
"had no reason to suspect that it was not in place, as
"indeed, there is no good reason for it not being in
"place."

(2) FAILURE TO USE HIS FACULTIES

Counsel on page 44 of his brief states his proposition in these words:— He (meaning Early) either saw and disregarded or heedlessly failed to see that there was absent from its accustomed place, a bar,'' etc. Counsel does not make it clear which one of these conditions he claims to have proved. Has he proved that Early failed to see and note the absence of the bar? No. Has he proved that Early heedlessly failed to see? No. He must accept and prove either one proposition, or the other for it is evident that both could not exist. Contributory negligence is an affirmative defense and the burden is upon him who asserts it.

Counsel then proceeds to cite decisions, every one of which is a case in which the injured person should have exercised and used his faculties, and failed to use them. Most of them are elevator cases wherein the injured person **walked** into danger. But in the case at bar there is absolutely no evidence to show whether Early did or did not see and note the absence of the bar, and no one could know that fact except Early himself. If he did see and note the absence of the bar then this falling overboard was due, either, to a lurch of the vessel, there being no bar in place to protect him; or, the sudden giving away of the door against which he was pushing, there being no bar in place to protect him. It is hardly reasonable to suppose, and we do not suppose counsel would contend that he purposely walked through

the doorway, after he observed it to be unprotected, and intentionally fell backwards into the water. If he did not observe the absence of the bar, then his falling may have been caused by either of the causes mentioned above, or by his attempting to lean upon the bar, supposing, as he had a right to suppose, it had been put in place.

The point we wish to make clear is, that there is no evidence as to whether Early did or did not use his faculties. Contributory negligence is an affirmative defence and the burden of proving it is upon the one who offers it as a defense, and certainly it is not proved in this case. The conclusion to which the trial court arrived is probably correct. He says (Page 285 Trans.)

"From all the surrounding circumstances I am "compelled to the belief, that with his attention fixed "on the door which had stuck, he approached it with "his side to the doorway, without observing or paus- "ing to observe its unprotected condition, but rely- "ing on the fact that the bar had always been in "place. It was between five-thirty and six o'clock in "the evening of Jan. 15th, and while not yet dark, it "was not wholly light. And though an examination "would have disclosed to him the absence of the pro- "tecting bar, his failure to make such examination, "having in view **all of the circumstances**, can neither "excuse such absence, nor charge him with such de- "gree of negligence, as to relieve petitioners from re- "sponsibility."

CONCLUSION OF SUBDIVISION

In conclusion permit us to say, that in the case at bar, the appellant discovered and knew, or ought to have known, the exposed situation of the decedent Early, and appellant could have avoided injuring him by the exercise of even ordinary care. And that under such a state of facts

> "The courts are almost universally "agreed that, notwithstanding the fact that "the plaintiff or the person injured **has been "guilty of some negligence in exposing his "person to an injury at the hands of the de-"fendant,** yet if the defendant discovered "the exposed situation of the person, in "time, and by the exercise of ordinary or "reasonable care could have avoided the in-"jury, and nevertheless failed to do so, **the "contributory negligence of the plaintiff or "of the person injured,** does not bar a recov-"ery of damages from the defendant."

Island &c. Co. vs Polson, 139 U. S. 551

Omaha Street R. Co. vs. Cameron 43 Neb. 297

61 N. W. Rep. 606

Krenzer vs. Pittsburg R. Co. 151 Ind. 592

12 Am. & Eng. R. C.

U. S. 343

5 Am| Neg. Rep. 173

43 N. E. Rep. 649

Neet vs. Burlington R. Co. 106 Iowa 248

5 Am. Neg. Rep. 26

Ford vs. Chicago R. Co., 106 Iowa 85

Baltimore Traction Co. vs. State 78 Md. 409.

Kirtly vs. Chicago R. Co., 65 Fed. Rep. 386

Thompson vs. Salt Lake R. T. Co., 16 Utah 281

40 L. R. A. 172

McLamb vs. Bangor R. C., 91 Me. 399

40 Atlt. 67

"Although the death or injury of a per-
"son may be immediately produced by his
"own act,—yet if this act was the necessary,
"legal, or natural consequence of the ori-
"ginal wrongful act of another person, that
"other will be answerable in damages for
"it."

Jones vs Louisville R. Co., 82 Ky. 610

Fowler vs. Baltimore R. Co., 82 W. Va. 579

The great weight of decisions hold, that in cases like the one at bar, the question of contributory negligence is one to be passed upon by the jury or the court sitting as a trial court. And where the trial court has heard the evidence and found the facts, the rule is

"The decision of a trial court in admir-
"alaty upon questions of fact, based on the
"conflicting testimony of witnesses exam-
"ined before the judge, will not be reserved
"on appeal, unless there is a decided pre-
"ponderance of evidence against it."

Memphis, etc., vs. Hill 122 Fed. 246
58 C. C. A. ..10
Whitney vs. Olsen, 108 Fed. 292
47 C. C. A. 331
Alaska, etc. vs. Domenico, 117 Fed. 99
54 C. C. A. 485
Paauhan, etc., vs. Palapala 127 Fed. 920
62 C. C. A. 552
Baton Ronge, et .cvs. George 128 Fed. 914
63 C. C. A. 640
Bakeer, etc. vs. Neptune Etc. 120 Fed. 247
56 C. C. A. 82
Jameson vs. Lewis, 131 Fed. 728
65 C. C. A. 586
The Columbian, 100 Fed. 991
41 C. C. A. 991
Elpricke vs. White, etc., 106 Fed. 945
46 C. C. A. 56
The Anaces, 106 Fed. 742
45 C. C. A. 596
City, etc. vs. Chrisholm, 90 Fed. 431
33 C. C. A. 157
The Edward Smith, 135 Fed. 32
67 C. C. A. 506
The Newport News, 105 Fed. 389
44 C. .C.A 541
The Svealand, 136 Fed. 109
69 C. C. A. 97
The Oscar B., 121 Fed. 978
58 C. C. A. 316

Perrians vs. Pac. Coast Co., 133 Fed. 140
66 C. C. A. 206

Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps.

The S. L. Watson, 188 Fed. 945
55 C. C. A. 439

When no new testimony is offered on appeal, the circuit court will not hastily disturb a decree on the point of damages nor unless it shows manifest injustice.

Cushman vs. Ryan, Fed. Cas. No. 3, 315.
1 Story 91.
The Lord Derby, 17 Fed. 265.

The rule is well settled in courts of admiralty that the decision of the trial court, which heard the witnesses, on questions of fact, will not be disturbed by an appellate court, unless clearly against the weight of evidence.

The J. G. Gilchrist, 183 Fed. 105.
105 C. C. A. 397.

12th SUBDIVISION.

THE SEVENTEENTH ASSIGNMENT OF ERROR.

The assignment is, that the court erred in sustaining the objection to all the evidence introduced by claimant.

That this assignment is without merit is clearly apparent.

13th SUBDIVISION

THE EIGHTEENTH ASSIGNMENT OF ERROR.

This assignment is as follows:

> "That the said District Court erred in "not rendering judgment for petitioner "Coggeshall Launch Company on the plead- "ings."

Appellant discusses this assignment on pages 9, 10, 11, 13, and 14 of his Brief.

THERE WAS NO MOTION MADE IN THE CASE FOR JUDGMENT ON THE PLEADINGS.

Search the Transcript of the Apostles as carefully as you may, and you cannot find wherein appellant ever made a motion **for judgment on the pleadings.**

True it was argued by appellant; and the court assumed there was such a motion and denied it; yet **in fact there was never any such a motion actually made.** In California the rule is that

> "Judgment on the pleadings cannot, "however, be properly rendered where the "answer denies any material allegation of "the complaint."

84	Cal.	476
50	Cal.	619
34	Cal.	39
51	Cal.	526
64	Cal.	24
60	Cal.	428

THE ANSWER AND CLAIM.

The answer and claim are in proper form. The answer is found on pages 47 to 52, and the claim on pages 328 to 336 of the Transcript of the Apostles on Appeal. The reason why the claim appears in the back part of the Trans. of the Apostles, is, that the original was mislaid in some way, and it was necessary to file a copy of the original nunc pro tunc. See stipulation on page 335 of the Apostles on Appeal.

An examination of the answer, will show that it conforms to all the requirements of the Rules in Admiralty. The allegations of the petition that are not admitted are specifically denied. And then, the answer proceeds to allege in apt words and proper form the negligence of the appellant, and showing wherein it was negligent, and that such negligence resulted in the death of claimant intestate. And then the answer prays, among other things, "for such other re- "lief as to the court may seem meet in the premises."

The allegations, averments and prayer of the answer are sufficient.

The claimant has pleaded a good cause for negligence in her answer. And she has proved the same.

Appellant does not deny that the Claim states a good cause of action. But then he asserts that the claim is no part of the pleading.

In this, counsel is in error. The answer and claim may be stated together in one instrument, or they may be separately stated. In other words, the

claimant on filing his claim becomes an actor; and if there are several claims filed

> "Each claim is treated as a distinct pro-
> "ceeding, in the nature of a several suit, on
> "which there may be an independent hear-
> ing, decree, or appeal."

Stratton vs. Jarvis, 33 U. S. 4
8 L. Ed. 846

REPLY TO PETITIONER'S POINTS AND AUTHORITIES.

As to the answer not being sufficient.

No exceptions to the answer and claim were filed; hence the attacks made by the appellant in its brief have no force.

I.

Strict and technical formality is not required of the answer but it must set forth the matters relied on, otherwise an exception for insufficiency will lie to compel a further and better answer. (The California 1 sawy. (U. S. 463.)

The petitioners having failed and neglected to file exceptions to the answer and claim of the claimant herein, they cannot now by argument only, attack the same. We must then consider the matters and things alleged in the answer and claim as confessed by the petitioners. Therefore the rule laid down in the case of In re Starin, 173 Fed. Rep.-721 has no application to the case at bar. In the cause cited the court says on page 721.

> "To this answer certain exceptions have been filed to the effect that the answer is indefinite and insufficient, in the sense that it does not state in what particular or particulars the steamer was unfit to successfully encounter and navigate, in what she was weak, and in what she was unseaworthy, or deficient in fittings, so as to successfully withstand the sea."

(At conclusion p. 723).

> "The exception will be sustained, and the claimant ordered to make his allegations of fault more definite."

As there were no exceptions filed to the answer and claim of the Claimant the rule laid down In Re Starin has no application here. Further, the Answer and Claim in the case at bar were full and sufficient disclosing clearly the fault and negligence of Appellant.

The Appellant cites the case of In Re Davidson S. S. Co. 133 Fed. Rep. 411. In that case, like in the case of In Re Starin supra. the petitioners filed exceptions to the Answer and Claim of the Claimant upon several grounds, and the exceptions were sustained on the grounds of the insufficiency thereof.

In the cause of the In Re. Marquette, 203 Fed. Rep. 127, cited by appellant, there was also exceptions filed to the Answer and Claim, which exceptions were also sustained. As these cases cited pass upon matters, not raised by the pleadings in the case at bar, they have no application here.

The latter case however might be cited as an

authority in support of the Claimant's pleadings; for the court says at page 130:—

> "The issues, being thus distinct, must be set out in separate pleadings."

The answer and claim of the claimant are set out in separate pleadings and are therefore in harmony with the rule laid down in 133 Fed. 411.

In the case of John H. Starin, 175 Fed. 527, the same state of facts are presented as in the former decision of the same case in 173 Fed. 721. For these reasons the decision in the Starin case has no application here.

II.

Claimant has clearly and conclusively shown that the doorway was left unprotected, because the appellant were in violation of the law, rules and regulations, operating the vessel one man short, and that by reason thereof there was no one to see to it that the bar was put in place, which United States authorities required the appellant to keep in place.

III.

We have no quarrel with rule laid down in Deslious vs. La Compagnie etc., 210 U. S. 95, 52 L. E. 973; and In Re Eastern Dredging Co., 159 Fed. 541.

"Strict and technical formality is not required in the answer."

> New Haven Towing Co. vs. New Haven, 116 Fed. 762.
> The Alexandria, 10 Fed. 904.

The Aldabaran, 1 Fed. Cas. No. 150.
The Nevaro, 17 Fed. Cas. No. 10,059.
The Pilot, 10 Fed. Cas. No. 11,168.

"If no exception is taken the reading of testimony cannot be objected to on the ground of the insufficiency of the answer."

The California, 4 Fed. Cas. No. 2,312.
The Rocket, 20 Fed. Cas. No. 11,975.

"Exceptions should state in clear and definite terms the particular ground on which they are based."

The Active, 1 Fed. Cas. No. 33.
The Schooner Navorso, 17 Fed. Cas. No. 10,059.

"A general exception as to the form of allegations will not be allowed. It should specify, briefly but clearly, the points excepted to."

The Dictator, 30 Fed. Cas. No. 699.

"Exceptions not insisted on at the opening of the trial will be waived."

Aumach vs. The Queen, 2 Fed. Cas. No. 657a.

White vs. Cynthia, 29 Fed. Cas. No. 17,546a.

"After testimony has been taken on the part of the claimant, without exceptions to the answer, the libelants cannot object at the hearing to the reading of the testimony on account of the insufficiency of the Answer."

The Rocket, 20 Fed. Cas. No. 11,975.
1 Biss. 354.

"Objection too late on argument."

The City of Carlisle, 29 Fed. 807.
5 L. R. A. 52.

14th SUBDIVISION.

THE REPLY TO APPELLANT'S CONTENTION OF ITS NON-LIABILITY.

The argument of counsel for appellant is ingenious in the extreme.

Let us analyze his conclusions found on pages 65, 66 and 67 of Appellant's Brief. Counsel say:

> "1. "It was not dark though not wholly "light. One could see the bar. (Wheelan "vs. Gas Light Co., Supra.)".

That one could see the bar is an assertion not supported by the evidence. Joseph Whelihan testifies:

"Q. Upon this evening could you see that the bar was up?

"Ans. I seen that it was not up. I did myself, "but George (deceased) never looked for it." (Trans. 131 at bottom of page). The testimony of the witnesses is that it was quite dark, though not wholly dark, nor was it wholly light. It was so dark that some of the witnesses could not see Early while floating in the water and before he sank. And it must have been so dark that Early could not readily dis-

tinguish whether the bar was in place or not.

In the case of Wheelan vs. Gas Light Co., the opinion states "It was bright day about 11 o'clock in the forenoon."

The facts are not parallel. In the Whelan case the obstacle could be readily seen; while in the case at bar, the fact that the barrier (the bar) was not in place, by reason of the growing darkness, could not be readily seen—therefore under the facts in the case Early was not afforded the opportunity of using his faculties.

> "2. The factor whose absence caused the "accident was large and situated well with- "in easy vision without looking at one's "feet. (Quirk vs. Siegel-Cooper Company, "supra)."

This case, reported in 60 N. Y. Supp. at page 228, states the law favorable to claimant.

> "3. The absence of the bar could easily "have been seen if Early had looked. "(Day vs. Cleveland C. C. & Lt. R. Co., Su- "pra.) or if he had paid the slightest at- "tention (Ballou vs. Collamore)."

The case of Day vs. Cleveland etc. 36 N. E. 854, is not in point for in this instance there was nothing to obstruct the view of plaintiff, and further in the Day case the master had provided his employee with a safe place to work, and the improper placing of the running board was a danger incident to his employment. So in the Ballou case, the absence of the elevator could be readily seen.

> "4. There was nothing to obscure Early's "vision. (Whalen vs. Gas Light and Co., "Supra.)."

This is an erroneous statement, for the evidence shows that while it was not quite dark yet it was not wholly light, and such in substance was the finding of the court, which is fully sustained by the evidence.

> "5. Early first approached the doorway "after observing his companions partially open the door."

A very natural thing for him to do, in view of the fact that theretofore the protecting bar had always been in place; and it was too dark for him to readily notice whether or not it was in place. He had the right to assume appellant had performed its duty by putting the bar in place as directed by the United States Inspectors.

> "6. Early shoved on the door near the point "where the bar would be if up."

Yet his sight was not directed toward the point where the bar would be if up. His left side was toward the opening, and he used his left arm, holding his dinner-pail in the right. Naturally his eyes would be directed toward the side of the opening at the sliding door, and not toward the place where the bar should have been. He had the right to assume and believe the appellant had performed its duty and put the bar in place. Evidently that is what he believed and thought, for in attempting to lean against the bar he fell backward into the water.

"7. Nothing distracted Early's attention "any more than deceased's attention was "distracted in the Donohue vs. Bioof case."

This case is not in point as there is no similarity in the facts. In that case the room was well lighted, and the bar-keeper shouted to him—"Don't go out that way."

"8. The opening was perfectly apparent. "(Gray vs. Seigel-Cooper Co. Supra.)."

This case, 79 N. Y. Supp. 813, is not in point. There is no similarity of the facts in any particular. The reading of the opinion clearly demonstrates that it cannot be used as an authority in the case at bar. The deceased in that case went to a place where he should not have gone, and the place was lighted so he could have seen the danger.

"9. Early's companions all saw that the "bar was down. (Sparks vs. Siebrecht, Su- "pra.)."

This case reported in 45 N. Y. S. 993, is not in point for in that case the facts were that

"the room was light and there was no dif- "ficulty in observing the open unguarded "trap door."

While in the case at bar, it was not light, in fact it was nearly dark. The rule of law laid down in Sparks vs. Sibrecht, supra, has no application to the facts in the case at bar. For in that case the room was so light that she could have readily seen the danger. "No one could pass without seeing the opening."

"10. Early approached a doorway leading

> "to a dangerous place with his back to it on
> "an occasion where the protection usually
> "present was not up, and failed to look.
> "(Brudie vs. Renault Freres Selling Branch
> "Inc., supra.)."

The facts in the case cited are nothing like the facts in the case at bar. No legal duty was imposed on the defendant. **The place** Early backed into was made dangerous only because appellant's negligence made it so. The negligence of appellant constituted a violation of a legal duty imposed on it. Early had always seen the protecting bar in place, and he had come to rely on its protection, and the right to rely upon its being there as usual. The open doorway was safe had the bar been there, and it was too dark for Early to readily distinguish whether it was there or not.

> Hanley vs. Eastern etc., 109 U. E. 168.
> "11. There was no statement that he (Ear-
> "ly) looked or if he had looked there was
> "any physical reason why he could not have
> "seen that bar had been moved. In the ab-
> "sence of any such showing the Court must
> "assume that 'to look was to see' and that
> "if he had looked he must have noticed the
> "danger (Kauffman vs. Machin Shirt Co.,
> "supra.)."

A comparison of the facts in the Kauffman case (167 Cal. 506) with the factors in the case at bar, clearly shows that it has no application here. In the Kauffman case, the court says

> "There is no statement that if he had
> "looked there was any physical reason why

"he could not have seen that the elevator "had been moved."

While the facts in the case at bar are, that it was growing dark, and naturally Early could not through the gathering gloom, well see whether the bar was in place or not.

The case of Gilfillan v. German etc., 106 N. Y. 601, is not in point for the reason that the facts are not in accord with the facts in the case at bar. A reading of the opinion will sustain our contention.

The last case that counsel cites in his conclusions is Larned v. Vanderlude, 131 N. W. 165. The facts there do not fit in with the facts in the case at bar, therefore it is not authoritative in sustaining appellant's contention.

IN CONCLUSION; THE SAME DEGREE OF CARE is not required in elevator cases when the party injured is not a passenger, AS WOULD BE REQUIRED, IF HE WERE A PASSENGER WHEN INJURED.

THE APPELLANT URGES:

1st. "That the carrier owes to the passenger "only a high degree of care."

And to support that contention appellant cites the cases of

Elder Etc. v. Pouppirt, 129 Fed. Rep. 732.

The City of Boston, 159 Fed. Rep. 261.

Pratt v. North German etc., 184 Fed Rep. 303.

These authorities do not sustain the appellant's contention hereinbefore quoted. The correct rule is laid down in the case of the New York C. R. Co. v. Lockwood, 84 U. S. 357, 21 L. Ed. 627, viz:

> "Where carrier undertakes to convey "passengers by the powerful and dangerous "agency of steam, public policy and safety "require that they should be held to the "greatest possible care and diligence."

Appellant cites the San Pedro (Boston etc. v. Lumber Co., 197 Fed. 703), a vessel which went to sea one man short contrary to regulations. A collision occurred by which injury occurred. That case cas no application here, because in that case the shortage of one man had no connection with the collision, WHILE IN THE CASE AT BAR the shortage of the man was the producing cause of the injury. Also, in the other cases cited on this point by counsel, the facts bring them under the exception rather than within the rule.

The true rule is tersely stated in McKune v. Santa Clara etc., 110 Cal. at page 486, to be

> "That the failure of any person to perform "a duty imposed upon him by statute or **le-"gal authority,** is sufficient evidence of neg-"ligence has been repeatedly declared by "the court."
>
> (Siemers vs. Eisen, 54 Cal. 418; Driscoll vs. Market Street Ry. Co. 97 Cal. 553, 33 Am. St. Rep. 203). "But the principal has this

> very obvious limitation. The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it."

2nd. On the question of decedent taking a dangerous position, counsel cites 85 Fed. 611, 125 Fed. 732, 45 N. Y. S. 728, 19 L. R. A. 487. These cases have no application. The rules there laid down do not fit the facts of the case at bar. Early did not take a dangerous position. The position was safe, had the bar been there, as required by the legal authorities, and the duty appellant owed to his passengers.

The rules laid down in 23 L. R. A. 758; 21 N. E. 311; 75 Pac. 212; 2 L. R. A. 83; 85 N. M. 149; 39 Fed. 596, 180 Fed. 495; 163 Fed. 662 and 155 Fed. 364, bearing on the question of the closed door, have no application, because in the case at bar there was a custom of opening the door.

CONCLUSIONS.

(1) Petitioners violated a statute by running one man short.

(2) This was the direct cause of the failure to put the bar in place, which in turn was the cause of the accident.

(3) Either or both of these constitute negligence for which the company is liable.

The first is negligence per se. The second the omission to perform a duty which the company clearly owed the passengers.

(4) The opening of the door was not a cause of the accident, because viewed in the light of the known custom it was merely an occasion or condition which should have been foreseen.

(5) There was no contributory negligence nor assumption of risk. Early could not assume a risk of which he had no knowledge; and his act in pushing on the door was not a negligent act, viewed in the light of the usual custom of opening the door, and the legal requirement and usual custom to have the bar in place. There is no evidence to sustain appellant's contention that he failed to use his faculties. He may have observed the absence of the bar and been precipitated through the door by force.

We respectfully submit that

> "Where the final condition of the rec-
> "ord is in accordance with the substantial
> "rules of the law, a court of admiralty does
> "not look at the intervening steps."
>
> The S. L. Watson, 118 Fed. 945.
> 55 C. C. A. 439.

And for the further reason that the findings of the Hon. District Court are fully sustained by the evidence, we submit that the judgment and decree appealed from should be affirmed.

Respectfully submitted,

W. ERNEST DICKSON,

Proctor for Appellee.